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## Comparative Study of the Formation of Electronic Contracts in American Law with References to International and Mexican Law

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# COMPARATIVE STUDY OF THE FORMATION OF ELECTRONIC CONTRACTS IN AMERICAN LAW WITH REFERENCES TO INTERNATIONAL AND MEXICAN LAW

*Roberto Rosas\**

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## I. INTRODUCTION

An understanding of the basic principles that regulate the formation of contracts is of great importance when trying to find the most appropriate ways of forming a new contract or when assessing the legality of an already existing contract. While the basic rules that regulate contract formation are generally applicable to all types of contracts regardless of the method

utilized in their creation, there are some juridical rules that apply specifically to those contracts created electronically.

The fundamental principles of contract formation in American law can be found in the Uniform Commercial Code (UCC)<sup>1</sup> although other laws have been enacted to regulate electronic transactions generally following the same principles of the UCC. Those laws are the Uniform Computer Information Transactions Act (UCITA),<sup>2</sup> the Uniform Electronic Transactions Act (UETA),<sup>3</sup> and the Electronic Signatures in Global and National Commerce Act (E-SIGN).<sup>4</sup> Under international law there is the United Nations Convention on Contracts for the International Sale of Goods (CISG),<sup>5</sup> while under Mexican law there is the *Código de Comercio* (Commerce Code)<sup>6</sup> and the *Código Civil Federal* (Federal Civil Code)<sup>7</sup> as well as other related statutes.

The objective of this article is to make a comparative analysis of the aforementioned laws in relation to the main elements involved in contract formation. An electronic contract is an agreement created and “signed” through electronic means. In other words, it is not necessary to use paper or some other palpable type of copy. This can be carried out through e-mail or, in forming an acceptance, when the party clicks on an icon that indicates such an acceptance.<sup>8</sup> Although the laws are similar in many aspects, they also have important differences that should be analyzed more in depth.

The international doctrine on computer law distinguishes

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1. See U.C.C. §§ 2-201-209 (2002).
  2. See UNIF. COMPUTER INFO. TRANSACTIONS ACT § 101:4 (2001) [hereinafter U.C.I.T.A.].
  3. See UNIF. ELEC. TRANSACTIONS ACT § 4 (1999) [hereinafter U.E.T.A.].
  4. Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001 (2000).
  5. United Nations Convention on Contracts for the International Sale of Goods, Apr. 10, 1980, 19 I.L.M. 671 [hereinafter C.I.S.G.].
  6. See CÓDIGO DE COMERCIO [CÓD.COM.] art. 89 (Mex.).
  7. See CÓDIGO CIVIL FEDERAL [C.C.F.] art. 1803 (Mex.).
  8. Nolo, *The Use of Electronic Signatures and Contracts*, at <http://www.nolo.com/lawcenter/ency/article.cfm/objectID/029C847E-2EFC-4913-B6DDC5849ABE81F9/catID/806B7BA0-4CDF-4221-9230A3135E2DF07A> (last visited Oct. 19, 2003).

between computerized contracts and those contracts created through electronic, optical, or other technological means.<sup>9</sup> While the former refers to those contracts, the content of which relates to computer equipment (technical support contracts, maintenance contracts, and others), the latter can be any type of contract whose perfection takes place by electronic, optical, or other technological means.<sup>10</sup>

It is appropriate first to make a brief review of the important technological changes that affect commercialization methods, which in turn leads us to observe from a juridical perspective the increasing diffusion of electronic commerce.

Recent technological development has permitted the appearance of new types of information and communication means that have shaped what is known as the *information society*.<sup>11</sup> Gema Botana García, an electronic commerce specialist and professor at the prestigious Universidad Europea de Madrid, indicates that the so called *new information technologies* incorporate changes that substantially transform the economy, human relations, culture, and politics in our society, allowing us to speak about the first and fastest global technological revolution.<sup>12</sup> The utilization of new communication technologies, such as developmental instruments of electronic commerce, gives obvious advantages, but also brings risks and uncertainties to electronic contracting.<sup>13</sup> "Consequently, it is necessary to find the adequate [juridical] solutions that will reduce, if not eliminate, said risks and uncertainties which are inherent nowadays in transactions by electronic means and that will allow for secure electronic commerce."<sup>14</sup>

Juridically, it is possible to affirm that technological change directs legislative change. Summarizing the legislation in the

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9. MIGUEL ANGEL DAVARA RODRÍGUEZ, *MANUAL DE DERECHO INFORMÁTICO* 191 (1997); JULIO TÉLLEZ VALDÉS, *DERECHO INFORMÁTICO* 95 (2d ed. 1996).

10. See C.C.F. art. 1805; CÓD.COM. art. 80.

11. Gema Botana García, *Noción de Comercio Electrónico*, in *COMERCIO ELECTRÓNICO Y PROTECCIÓN DE LOS CONSUMIDORES* 5, 5 (J. M. Badenas Carpio et al. eds., 2001).

12. *Id.* at 58.

13. *Id.*

14. *Id.* (translated by autor).

United States, as previously mentioned, in addition to the UCC (whose second original article was considered the crown jewel of the Code) and E-SIGN (which is a federal law), one can observe the presence of two other relatively uniform laws on electronic commerce available for adoption in all states. These two laws are UETA and UCITA, both of which include substantial differences in their content.

Authoritative sources, particularly Professor Arthur Rosset—a well-respected American academician—assert that UETA could be adopted by the states and would offer a flexible framework for electronic commercial transactions in the United States, at both state and national levels. Alternatively, “UCITA’s future is more problematic . . . and will be a source of controversy.”<sup>15</sup> Rosset finds the basis to affirm the former statement in the formation process that was followed by both laws and the interconnections between national and international organizations that have worked to give the laws shape.<sup>16</sup>

The following commentaries, stated by the same author, will explain the above statements. The purpose of UETA is to supplement the existing legislation for the limited purpose of using electronic media for determinate transactions while not changing the substantive law of these transactions in other aspects.<sup>17</sup> In other words, UETA is foreseen as a group of procedural rules, with the intention of making electronic transactions equivalent in every way to documented transactions, while leaving the rules on the formation of contracts unchanged.<sup>18</sup> Additionally, UETA captures United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce<sup>19</sup> as its basis both in form

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15. Arthur Rosset, *La Regulación Legislativa del Comercio Electrónico: Una Perspectiva Norteamericana*, 8 REVISTA DE LA CONTRATACIÓN ELECTRÓNICA [RCE] 21, 26 (2000).

16. *Id.*

17. *Id.* at 34.

18. *Id.* at 32.

19. See UNCITRAL *Model Law on Electronic Commerce*, U.N. GAOR 51<sup>st</sup> Sess., 85<sup>th</sup> plen. mtg., U.N. Doc. A/51/162 (1996).

and in content.<sup>20</sup>

Rosset continues by indicating that, in contrast to UETA, the document which came to be known as UCITA could not be considered simply at a procedural level because its editors adopted a substantive approach that presented conflicts with more fundamental issues.<sup>21</sup> In addition, the majority of people involved in this project had strong professional ties linking them to commercial interests,<sup>22</sup> and few identified with consumers.<sup>23</sup> The version of the document that became UCITA generated controversy and strong criticism from groups of consumers who believed that it perfectly adapted itself to the interests of the computer programming industry.<sup>24</sup>

In Mexico, reality forced legislative activity to properly recognize and regulate data exchange by electronic, optical, or other technological means where the creation, transmission, modification, or termination of rights and obligations can be addressed. The documents relating to electronic commerce and electronic signatures in Mexico are: *Ley de Instituciones de Crédito* (LIC);<sup>25</sup> *Ley del Mercado de Valores* (LMV);<sup>26</sup> *Ley de Adquisiciones, Arrendamientos y Servicios del Sector Público* (LAASSP);<sup>27</sup> *Ley de Obras Públicas y Servicios Relacionados con las Mismas* (LOPSRM);<sup>28</sup> *Código Civil Federal* (CCF);<sup>29</sup> *Código Federal de Procedimientos Civiles* (CFPC);<sup>30</sup> *Código de Comercio*

20. See, e.g., U.E.T.A. § 2 (1999); see also Rosset, *supra* note 15, at 32.

21. Rosset, *supra* note 15, at 36.

22. *Id.*

23. *Id.*

24. *Id.*

25. LEY DE INSTITUCIONES DE CREDITO [L.I.C.] arts. 52, 57, 101 (Mex.). The credit institutions will be able to agree . . . on the use of equipment, optical, or electronic means or of other technology . . . The use of identification methods that are established according to this Article, in substitution of a written signature, will produce the same effects that the law provides to such documents and, consequently, will have the same legal value. See *id.* art. 52.

26. LEY DEL MERCADO DE VALORES [L.M.V.] arts. 26, bis 8 91, 100 (Mex.).

27. LEY DE ADQUISICIONES, ARRENDAMIENTOS Y SERVICIOS DEL SECTOR PÚBLICO [L.A.A.S.S.P.] arts. 26, 27, 29, 31, 56, 65, 67 (Mex.).

28. LEY DE OBRAS PÚBLICAS Y SERVICIOS RELACIONADOS CON LAS MISMAS [L.O.P.S.R.M.] arts. 27, 28, 31, 33, 74, 83, 85 (Mex.).

29. C.C.F. arts. 1803, 1805, 1811, 1834 bis (Mex.).

30. CODIGO FEDERAL DE PROCEDIMIENTOS CIVILES [C.F.P.C.] art. 210-A (Mex.).

(CC);<sup>31</sup> *Ley Federal de Protección al Consumidor* (LFPC);<sup>32</sup> and *Ley Federal de Procedimiento Administrativo* (LFPA).<sup>33</sup>

## II. FIELD OF APPLICATION<sup>34</sup>

The UCC<sup>35</sup> is utilized in transactions involving goods or personal property, but does not apply to transactions that, although taking the form of a contract of sale and purchase, are carried out with the intent of operating only as security transactions.<sup>36</sup> Article 2 applies only to contracts connected with the present or future sale of goods.<sup>37</sup> Generally, dispositions contained in Article 2 are applicable only to contracts for the sale of goods with a value of \$500 or more.<sup>38</sup> In such transactions the UCC dictates several requirements, most importantly that such contracts be in writing.<sup>39</sup> The term “goods,” under this law, refers to movable personal property, unborn young of animals, and growing crops.<sup>40</sup> When the transaction includes the buying and selling of goods in conjunction with services, the UCC applies only in cases where the primary purpose of entering into the contract is to obtain goods.<sup>41</sup>

On the other hand, the CISG is applicable to the formation of contracts for the buying and selling of goods between parties whose principle places of business are in different countries that have ratified this Convention.<sup>42</sup> Alternatively, the CISG applies

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“Information created or communicated by electronic, optical or other technological means will be recognized as proof.” *Id.*

31. See CÓD.COM. arts. 21 bis, 80, 89, 1205, and 1298-A (Mex.).

32. LEY FEDERAL DE PROTECCIÓN AL CONSUMIDOR [L.F.P.C.] arts. 1, 76 bis (Mex.).

33. LEY FEDERAL DO PROCEDIMIENTO ADMINISTRATIVO [L.F.P.A.] art. 69 (Mex.).

34. Reference, *infra*, TABLE 1: FIELD OF APPLICATION.

35. The UCC has been adopted by all of the states, including the U.S. Virgin Islands. U.C.C. § 1-101:2 (2002).

36. U.C.C. § 2-102 (2002).

37. *Id.* § 2-106(1).

38. *Id.* § 2-201(1).

39. *Id.*

40. See *id.* § 2-105(1).

41. See, e.g., *Perlmutter v. Beth David Hosp.*, 123 N.E.2d 792, 795 (N.Y. 1954).

42. C.I.S.G., Apr. 10, 1980, 19 I.L.M. 671, art. 1(1). As of August 20, 2003, 62 countries have adopted this convention: Argentina, Australia, Austria, Belarus, Belgium,



“when the rules of private international law lead to the application of the law of a Contracting State.”<sup>43</sup> Additionally, the fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealing between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.<sup>44</sup>

“Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.”<sup>45</sup> Generally, there are three essential requirements for its application: the contract must have been formed after January 1, 1988; the parties must have their principle places of business in different nations; and both nations must be signatories to the CISG.<sup>46</sup> This Convention is not applicable to transactions related to the sale of goods for personal, familial, or household uses unless the seller did not know and had no way of knowing that the goods would be used for such purposes.<sup>47</sup> Neither does the CISG apply to transactions related to stocks, shares, investment securities, negotiable instruments and money, ships, vessels, hovercrafts, aircrafts, or electricity.<sup>48</sup>

Under the CISG, “contracts for the supply of goods to be manufactured . . . are to be considered sales, unless the party

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Bosnia-Herzegovina, Bulgaria, Burundi, Canada, Chile, China, Columbia, Croatia, Cuba, Czech Rep., Denmark, Ecuador, Egypt, Estonia, Finland, France, Georgia, Germany, Greece, Guinea, Honduras, Hungary, Iceland, Iraq, Israel, Italy, Kyrgystan, Latvia, Lesotho, Lithuania, Luxembourg, Mauritania, México, Moldova, Mongolia, Netherlands, New Zealand, Norway, Peru, Poland, Romania, Russian Federation, Saint Vincent & Grenadine, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Syria, Uganda, Ukraine, United States, Uruguay, Uzbekistan, Yugoslavia, Zambia. Albert H. Kritzer, *CISG: Table of Contracting States*, at <http://www.cisg.law.pace.edu/cisg/countries/cntries.html> (last updated Aug. 28, 2003).

43. C.I.S.G. art. 1(1).

44. *Id.* at art. 1(2).

45. *Id.* at art. 1(3).

46. Gary Kenji Nakata, *Filanto S.P.A. v. Chilewich International Corporation: Sounds of Silence Bellow Forth Under the CISG's International Battle of the Forms*, 7 *TRANSNAT'L LAW* 141, 147 (1994).

47. C.I.S.G., art. 2.

48. *Id.*

who ordered the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.”<sup>49</sup> The decrees of the CISG do “not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists [of] the supply of labour [sic] or other services.”<sup>50</sup> Additionally, the CISG does not contain decrees related to: the validity of the contract; the effect the contract may have on the goods sold;<sup>51</sup> or “the liability of the seller for [the] death or personal injury caused by the goods to any person.”<sup>52</sup>

Approved in 2000, UCITA applies to computer information transactions,<sup>53</sup> which are defined under this Act as transactions formed with the intent to create, modify, transfer, or license computer information obtained in a manner capable of being processed by a computer.<sup>54</sup> In UCITA, the term “computer information” means “information in electronic form which is obtained from or through the use of a computer or which is in a form capable of being processed by a computer” and “includes a copy of the information and any documentation or packaging associated with the copy.”<sup>55</sup>

UCITA indicates that, should a “transaction include[] computer information and goods, this [Act] applies to the part of the transaction involving computer information, informational rights in it, and creation or modification of it.”<sup>56</sup> In all other cases, “this [Act] applies to the entire transaction if the computer information and informational rights, or access to them, is the primary subject matter . . . .”<sup>57</sup> Among other things, UCITA does not apply to a financial services transaction, or an agreement for the creation, acquisition, use, distribution,

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49. *Id.* art. 3(1).

50. *Id.* art. 3(2).

51. *Id.* art. 4.

52. *Id.* art. 5.

53. U.C.I.T.A. § 103(a) (2001). To date, this law has been adopted only in Virginia and Maryland. *Id.*

54. *See id.* § 102(a)(11).

55. *Id.* § 102(a)(10).

56. *Id.* § 103(b)(1).

57. *Id.* § 103(b)(3).

modification, reproduction, adaptation, transmission, or display of audio or visual programming.<sup>58</sup>

UCITA also does not apply to motion pictures, sound recordings, musical works, or phonorecords.<sup>59</sup> Equally, a contract of employment of an individual is not regulated by this Act.<sup>60</sup> It is also worth mentioning that if UCITA were to conflict with Article 9 of the UCC (related to financial services transactions), the UCC would govern.<sup>61</sup> Generally, but with several exceptions, “a contract requiring payment of [a contract fee of] \$5,000 or more is not enforceable by way of action or defense unless” a record exists that a contract has been formed.<sup>62</sup>

UETA applies to electronic records and electronic signatures relating to transactions.<sup>63</sup> In UETA, an “electronic signature means an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.”<sup>64</sup> Nevertheless, this Act does not apply to a transaction to the extent it is governed by Article 2 of the UCC or to the extent that UCITA applies.<sup>65</sup>

E-SIGN gives validity to contracts and other documents signed in electronic form and involved in interstate or foreign commerce.<sup>66</sup> Nevertheless, this Act does not require any person to agree to use or accept electronic records or electronic

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58. *Id.* § 103(d)(3)(A).

59. *Id.* § 103(d)(3)(B).

60. *Id.* § 103(d)(5).

61. *Id.* § 103(c); *see also* U.C.C. § 9-109 (2002) (stating that the Article applies to any transaction that is related to the transfer of personal property interests in contract, among other things).

62. U.C.I.T.A. § 201(a)(1) (2001).

63. U.E.T.A. § 3 (1999). This Act has been adopted by the following states: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, and Wyoming. Uniform Law Commissioners, A Few Facts About the Uniform Electronic Transactions Act, at [http://www.nccusl.org/nccusl/uniformact\\_factsheets/uniformacts-fs-ueta.asp](http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-ueta.asp) (last visited Oct. 19, 2003).

64. U.E.T.A. § 2(8).

65. *Id.* §§ 3(b)(2)–(3).

66. 15 U.S.C. § 7001(a).

signatures.<sup>67</sup> E-SIGN also indicates that if a statute, regulation, or other rule of law requires that information relating to a transaction be provided and made available to a consumer in writing, the use of an electronic record to provide or to make available such information satisfies the requirement that the information be in writing if the consumer has affirmatively consented to its use and has not withdrawn consent.<sup>68</sup> Additionally, E-SIGN applies to the retention of documents. In other words, when

a statute, regulation, or other rule of law requires that a contract or other record relating to a transaction in or affecting interstate or foreign commerce be retained, that requirement is met by retaining an electronic record of the information in the contract or other record that accurately reflects the information set forth in the contract or other record; and remains accessible to all persons who are entitled to access by statute, regulation, or rule of law.<sup>69</sup>

Alternatively, E-SIGN does not apply to “court orders or notices, or official court documents . . . required to be executed in connection with court proceedings.”<sup>70</sup> It also does not apply to “any notice of the cancellation or termination of utility services (including water, heat, and power); default, acceleration, repossession . . . or the cancellation or termination of health insurance or life insurance benefits.”<sup>71</sup> In states where UETA has been adopted, it can be applied and used to replace E-SIGN provisions.<sup>72</sup> Finally, E-SIGN does not apply to a contract or other record to the extent it is governed by the UCC.<sup>73</sup>

In Mexico, with respect to application of the LIC, reference can be made to utilization of electronic identification means that

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67. *Id.* § 7001(b)(2).

68. *Id.* § 7001(c)(1)(A).

69. *Id.* § 7001(d)(1)(A) – (B).

70. *Id.* § 7003(b)(1).

71. *Id.* § 7003(b)(2)(A)–(C).

72. *Id.* § 7002(a)(1).

73. *Id.* § 7003(a)(3).

have the same validity as a written signature.<sup>74</sup> The LMV refers to utilization of electronic or computer means for instructing on the field of financial contracts.<sup>75</sup> Application of the LAASSP addresses the possibility of presenting bids from the public sector through electronic means using electronic identification.<sup>76</sup> The juridical value of the offer and acceptance expressed in electronic, optical, or other technological format allowing for immediate expression is considered under the LOPSRM.<sup>77</sup> The CCF considers the possibility of using electronic signatures.<sup>78</sup> A determination under the CFPC addresses the moment when an acceptance is created, sent, received, or filed through electronic, optical, or other technological means.<sup>79</sup> The regulation of the moment in which an acceptance is considered received through electronic, optical, or other technological means is determined under the CC.<sup>80</sup> The LFPC considers the recognition and rules to determine the probative value of information created, sent, received, filed, or communicated through electronic, optical, or other technological means.<sup>81</sup> Finally, the LFPA addresses dispositions regarding the protection of consumers of goods and services made through electronic, optical, or other technological means.<sup>82</sup>

It is also worth mentioning that the regulation of the certification process needed to allow a physical person to obtain an electronic signature was recently passed and published in the *Diario Oficial de la Federación* on August 29, 2003, and will become effective ninety days after that date—these amendments to the Mexican Commercial Code essentially adopt the principals provided by UNCITRAL.<sup>83</sup>

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74. L.I.C. art. 52 (Mex.).

75. L.M.V. art. 91(V) (Mex.).

76. L.A.A.S.S.P. art. 27 (Mex.); L.O.P.S.R.M. art. 28 (Mex.).

77. C.C.F. art. 1805 (Mex.).

78. *See id.* art. 1834-bis; CÓD.COM. arts. 21-bis, 30-bis (Mex.); L.F.P.A. art. 69 (Mex.).

79. C.C.F. art. 1805; CÓD.COM. art. 80.

80. CÓD.COM. art. 91.

81. C.F.P.C. art. 210-A (Mex.); CÓD.COM. arts. 1205, 1298-A.

82. L.F.P.C. art. 76-bis (Mex.).

83. "Decreto por el que se reformen y adicionian diversas disposiciones del Código de Comercio en Materia de Firma Electrónica," D.O., 29 de Agosto de 2003; GAOR

### III. AUTONOMY OF THE PARTS (EXCLUSIONS, EXCEPTIONS, AND MODIFICATIONS)<sup>84</sup>

Article 2 of the UCC does not contain any provision explicitly stating how to exclude its application in transactions involving goods. However, Article 1 indicates that, when a transaction bears a reasonable relation to one state and also to another state or nation, the parties may agree that the law of either state or nation shall govern their rights and duties.<sup>85</sup>

“Failing such an agreement, [the UCC] applies to transactions bearing an appropriate relation to th[e] state.”<sup>86</sup> Additionally,

the effect of the provisions of this Act may be varied by agreement, except as otherwise provided in this Act and except that the obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.<sup>87</sup>

Similarly, the CISG allows the parties to exclude its application or to vary the effect of any of its provisions.<sup>88</sup>

UCITA also gives the parties the option to choose the applicable law to apply to their transactions unless a rule within that jurisdiction forbids it.<sup>89</sup> The Act indicates that this “choice is not enforceable in a consumer contract to the extent it would vary a rule that may not be varied by agreement under the law of the jurisdiction whose law would apply . . . in the absence of the agreement.”<sup>90</sup> UCITA also determines which jurisdiction’s law governs in all respects for purposes of contract law “in the

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Res. 51/162, *supra* note 20.

84. Reference, *infra*, TABLE 2: AUTONOMY OF PARTS.

85. U.C.C. § 1-105(1) (2002).

86. *Id.*

87. *Id.* § 1-102(3).

88. C.I.S.G., Apr. 10, 1980, 19 I.L.M. 671, art. 6.

89. U.C.I.T.A. § 109(a) (2001).

90. *Id.*

absence of an enforceable agreement on choice of law.<sup>91</sup>

UETA is a little more general in its provisions with regard to its application. For example, UETA makes clear that it “does not require a record or signature to be created, generated, sent, communicated, received, stored, or otherwise processed or used by electronic means.”<sup>92</sup> UETA indicates that its application is purely voluntary and depends on mutual agreement between the parties to conduct transactions by electronic means.<sup>93</sup> It also indicates that “[w]hether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties’ conduct.”<sup>94</sup> UETA also indicates that, even when a party has agreed to conduct transactions by electronic means, that a party may refuse to conduct other transactions by electronic means.<sup>95</sup> Further, “the right[s] granted by this provision may not be waived by agreement.”<sup>96</sup> Generally, however, most other provisions of UETA may be varied by agreement.<sup>97</sup>

E-SIGN does not “require any person to agree to use or accept electronic records or electronic signatures, other than a governmental agency with respect to a record other than a contract to which it is a party.”<sup>98</sup> Also, E-SIGN indicates that when “a statute, regulation, or other rule of law requires that information relating to a transaction or transactions . . . [be] made available . . . in writing, the use of an electronic record to provide or make available . . . such information satisfies the requirement that such information be in writing if” the consumer consents.<sup>99</sup>

As previously mentioned, in Mexico, on civil as well as commercial matters, there is no need for a previous agreement between contracting parties for information created, sent,

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91. *Id.* § 109(b).

92. U.E.T.A. § 5(a) (1999).

93. *See id.* § 5(b).

94. *Id.*

95. *Id.* § 5(c).

96. *Id.*

97. *Id.* § 5(d).

98. 15 U.S.C. § 7001(b)(2).

99. *Id.* § 7001(c)(1)(A).

received, or filed through electronic, optical, or other technological means, to take effect.<sup>100</sup>

#### IV. FORMATION OF THE ELECTRONIC CONTRACT

##### A. *The Offer*<sup>101</sup>

An offer can be defined as “a declaration of receptive intent, which being sufficiently definite, aims toward the perfection of the contract by means of the concurrence with the statement of the recipient of the proposal.”<sup>102</sup> The absence of any of these elements implies that existence of the contract cannot be established or perfected.<sup>103</sup>

The UCC establishes that

an offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months.<sup>104</sup>

With regard to the elements of the offer, the UCC also indicates that “an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances.”<sup>105</sup> Additionally, the UCC explains that an “offer to buy goods for prompt or current shipment shall be construed as inviting acceptance [whether] by a prompt promise to ship or

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100. C.C.F. art. 1811 (Mex.). See also Cód.COM. art. 80 (Mex.) (stating that agreements and mercantile contracts created by correspondence, telegraph, or electronic means will be complete at the time of receipt of acceptance of the proposal or the conditions with which it has been modified).

101. Reference, *infra*, TABLE 3(a): FORMATION OF THE ELECTRONIC CONTRACT: THE OFFER.

102. Maria del Pilar Perales Viscasillas, *Formación del Contrato Electrónico, in RÉGIMEN JURÍDICO DE INTERNET 875, 886-87* (Javier Cremades et al. eds. 2002).

103. The term “perfection” in this article is used to describe the consummation or execution of a contract without defect. Although more commonly used in the field of secured transactions, the term was chosen as a more accurate description of the act of fulfilling all legal requirements for the formation of a contract.

104. U.C.C. § 2-205 (2002).

105. *Id.* § 2-206(1)(a).



by the prompt or current shipment of conforming or non-conforming goods . . . .”<sup>106</sup>

With regard to the offer, the CISG considers that a “proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance.”<sup>107</sup> Such a proposal is “sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provisions for determining the quantity and the price.”<sup>108</sup> Such “an offer becomes effective when it reaches the offeree” but can be withdrawn, even if irrevocable, “if the withdrawal reaches the offeree before or at the same time as the offer.”<sup>109</sup> “An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror.”<sup>110</sup> Also, any offer can be revoked until the contract is concluded, so long as “the revocation reaches the offeree before he has dispatched an acceptance.”<sup>111</sup> However, “an offer cannot be revoked if it indicates, whether by stating a fixed time for its acceptance or otherwise, that it is irrevocable; or 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.”<sup>112</sup>

With regard to an offer, UCITA indicates that “an offer to make a contract invites acceptance in any manner and by any medium reasonable under the circumstances” unless otherwise unambiguously indicated by the language or the circumstances.<sup>113</sup> “An order or other offer to acquire a copy for prompt or current delivery invites acceptance by either a prompt promise to ship or a prompt or current shipment of a conforming or nonconforming copy.”<sup>114</sup> An offer, like an acceptance, “is conditional if it is conditioned on agreement by the other party

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106. *Id.* § 2-206(1)(b).

107. C.I.S.G., Apr. 10, 1980, 19 I.L.M. 671, art. 14(1).

108. *Id.*

109. *Id.* art. 15(1)–(2).

110. *Id.* art. 17.

111. *Id.* art. 16(1).

112. *Id.* art. 16(2)(a)–(b).

113. U.C.I.T.A. § 203(1) (2001).

114. *Id.* § 203(2).

to all the terms of the offer or acceptance.”<sup>115</sup> At the same time, “a conditional offer or acceptance precludes formation of a contract unless the other party agrees to its terms.”<sup>116</sup>

UETA does not include any rules or terms specifically related to the offer; it only authorizes the use of records or electronic signatures in the formation of contracts.<sup>117</sup>

Similarly, the legal effect of E-SIGN is limited to the use of electronic signatures, contracts, or other records affecting interstate or foreign commerce.<sup>118</sup> However, E-SIGN does not affect any other rule or law that regulates the formation of contracts except to allow for the use of electronic medium for its formation.<sup>119</sup> This Act indicates that it does not “affect[] the content or timing of any disclosure or other record required to be provided or made available to any consumer under any statute, regulation, or other rule of law.”<sup>120</sup>

In Mexico, in relation to the offer or proposition, one must determine whether the offer was made between present or absent parties, whether a time frame was fixed, and whether the offer was made through a telegraph or other electronic, optical, or other technological means. For this reason, if an offer is made in person without setting a time for acceptance, the offeror is not bound if an acceptance is not given immediately. The same rule applies to offers by telephone or other electronic, optical, or technological means that allow an immediate acceptance.<sup>121</sup> It must also be noted that immediacy cannot take place in communications through e-mail, fax, or telefax. When the offer is made between present parties with a fixed time frame, the offeror is bound by his offer until the expiration of that time period.<sup>122</sup>

In an offer made to a person not physically present and without a time period for its acceptance, the offeror is bound for

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115. *Id.* § 205(a).

116. *Id.* § 205(b).

117. *See* U.E.T.A. §§ 2(16), 3(a), 4 (1999).

118. *See* 15 U.S.C. § 7001(a).

119. *See id.* § 7001(a)(1).

120. *Id.* § 7001(c)(2)(A).

121. C.C.F.art. 1805 (Mex.).

122. *Id.* art. 1804.

three days plus the time necessary for the public mail to deliver the offer to the place of the offeree and back.<sup>123</sup> Alternatively, in the absence of public mail, the offeror is bound for sufficient delivery time in accordance with the distances and the available communication channels between the parties.<sup>124</sup> An offer is considered not made if it is withdrawn by the offeror and such withdrawal is received by the offeree prior to the offer; the same rule applies when the acceptance is withdrawn.<sup>125</sup> If prior to the acceptance the offeror dies and the offeree has no knowledge of the death, the offeror's heirs become obligated by the contract if accepted.<sup>126</sup>

The offeror is released from his offer if the acceptance is not clear and plain, but contains modifications to the offer.<sup>127</sup> In that case, the response is considered a new offer and is governed by the provisions of other related articles.<sup>128</sup>

An offer and acceptance made by telegraph are effective if the contracting parties previously agreed in writing to this way of contracting, and if the original copy of the telegram contains the parties' signature and the appropriate codes agreed to by them.<sup>129</sup>

### *B. The Acceptance*<sup>130</sup>

The acceptance can be defined as "a manifestation of will by which the offeree shows agreement with the offer."<sup>131</sup> The law appears to recognize three acceptable ways of accepting an offer: expressly accepting; impliedly accepting; or tacitly accepting through the silence or inaction of the offeree. It would be convenient to mention that the statutes of various countries consider that any consent through electronic means falls within

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123. *Id.* art. 1806.

124. *Id.*

125. *Id.* art. 1808.

126. *Id.* art. 1809.

127. *Id.* art. 1810.

128. *Id.*

129. *Id.* art. 1811.

130. Reference, *infra*, TABLE 3(b):FORMATION OF THE ELECTRONIC CONTRACT: THE ACCEPTANCE.

131. Viscasillas, *supra* note 103, at 902.

the expressed declarations of intent.<sup>132</sup>

In accordance with the UCC, an acceptance can be accomplished in any manner and by any medium reasonable under the circumstances.<sup>133</sup> The “shipment of non-conforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer.”<sup>134</sup> With regard to acceptance of the offer, the UCC also indicates that a definite and timely acceptance or a written confirmation sent within a reasonable time is considered valid even if “it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.”<sup>135</sup>

With regard to acceptance, the CISG indicates that an acceptance can be “a statement made by or other conduct of the offeree indicating assent to an offer . . . .”<sup>136</sup> However, in situations where the parties have previously carried out several contracts between them, courts have decided that not objecting to a certain term is a valid acceptance.<sup>137</sup>

An acceptance becomes effective at the moment it reaches the offeror so long as acceptance occurs within the terms indicated in the contract, or if the contract does not establish a definite period, a reasonable time under the circumstances.<sup>138</sup> In some cases “the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror . . . .” and as a result of the established practices or usage.<sup>139</sup> The preceding would become effective at the moment the acceptance is performed, provided it is performed within the period of time laid down or, if no deadline is set, within a reasonable time.<sup>140</sup>

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132. *Id.* at 902-03.

133. U.C.C. § 2-206(1)(a) (2002).

134. *Id.* § 2-206(1)(b).

135. *Id.* § 2-207(1).

136. C.I.S.G., Apr. 10, 1980, 19 I.L.M. 671, art. 18(1).

137. *See Nakata, supra* note 47, at 156.

138. C.I.S.G. art. 18(2).

139. *Id.* art. 18(3).

140. *Id.* art. 18(2)–(3).

The CISG also indicates that “a late acceptance is nevertheless effective as an acceptance if without delay the offeror orally informs the offeree or dispatches a notice to that effect.”<sup>141</sup> An exception to this is if the offeror informs the offeree without an unjustifiable delay that the offer has lapsed.<sup>142</sup>

With regard to the acceptance, UCITA indicates that a person manifests assent to a record or term if the person, acting with knowledge of, or after having an opportunity to review the record or term . . . , authenticates the record or term with intent to adopt or accept it; or intentionally engages in conduct or makes statements with reason to know that the other party or its electronic agent may infer from the conduct or statement that the person assents to the record or term.<sup>143</sup>

Basically, the same requirements apply to acceptance through an electronic agent.<sup>144</sup>

UETA states that “if the beginning of a requested performance is a reasonable mode of acceptance, an offeror that is not notified of acceptance or performance within a reasonable time may treat the offer as having lapsed before acceptance.”<sup>145</sup> “If an offer in an electronic message evokes an electronic message accepting the offer, a contract is considered formed: when an electronic acceptance is received; or . . .” if the response consists of beginning or full performance, when the performance is received.<sup>146</sup>

Under UETA, an electronic record is received when “it enters an information processing system that the recipient has

141. *Id.* art. 21(1).

142. *See id.* art. 21(2).

143. U.C.I.T.A. § 112(a)(1)–(2) (2001).

144. *Compare id.* § 112(b)(1)–(2) (limiting assent through an electronic agent to situations where the agent either authenticates the record or performs operations that indicate acceptance), *with id.* § 112(a)(1)–(2) (limiting assent through a person to situations where the person either authenticates the record or engages in conduct that indicates assent).

145. *Id.* § 203(3).

146. *Id.* § 203(4).

designated or uses for the purpose of receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record.”<sup>147</sup> An electronic record is received “even if no individual is aware of its receipt.”<sup>148</sup>

E-SIGN establishes that when a statute, regulation, or other rule of law requires information relating to a transaction be made available in writing, the consumer should affirmatively consent to the use of an electronic record.<sup>149</sup> Before consenting to the application of this law, the consumer should receive a clear and conspicuous statement informing the consumer of any right or option to have the record provided or made available on paper or in non-electronic form, and of his right to withdraw his consent to the use of electronic means in his transactions.<sup>150</sup>

In Mexico, with regard to acceptance, one must determine whether it was made between present or absent parties, whether a timeframe was fixed, and whether it was made through a telegraph or other electronic, optical, or other technological means.

For this reason, an acceptance made between parties physically present without a fixed time period must be made immediately. This same rule applies to offers made through any electronic, optical, or other technological means that allow for an immediate offer and acceptance.<sup>151</sup> If acceptance does not take place immediately, the offeror is not bound by the offer.<sup>152</sup> Communications made via e-mail, fax, or telefax are not considered immediate.

When acceptance is made between two parties physically present and with a fixed time period, acceptance must occur within that time period.<sup>153</sup> In an acceptance between two parties not physically present and without a fixed time period, acceptance must take place before the offeror withdraws the

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147. U.E.T.A. § 15(b) (1999).

148. *Id.* § 15(e).

149. 15 U.S.C. § 7001(c)(1)(A).

150. *Id.* § 7001(c)(1)(B)(i).

151. C.C.F. art. 1805 (Mex.).

152. *Id.*

153. *Id.* art. 1804.

offer and the offeree becomes aware of such withdrawal.<sup>154</sup> An acceptance can be withdrawn as long as the offeror is notified before receiving the acceptance.<sup>155</sup> If, prior to acceptance, the offeror dies and the offeree has no knowledge of the death, the offeror's heirs become obligated by the contract if it is accepted.<sup>156</sup>

If the acceptance is not clear and plain, or contains modifications to the offer, the offeror is released from his offer.<sup>157</sup> In this case, the response is considered a new offer and is governed by the provisions of other related articles.<sup>158</sup>

An offer or acceptance by telegraph is effective only if the parties previously agreed in writing to contract in this manner, and if original copies of the respective telegraphs bear the signatures of the contracting parties and the appropriate codes agreed to by them.<sup>159</sup> Regarding offers and acceptances made by electronic, optical, or other technological means, a previous agreement between the contracting parties is not required for these means to be effective.

### C. *The Perfection*<sup>160</sup>

Under Mexican law—"perfected" means the exact moment when a contract acquires juridical life—the contract is perfected at the moment the offer is accepted without modification. There are four theories that govern the precise moment of contract perfection: declaration; dispatch; reception; and understanding or information.<sup>161</sup> For electronic contracts—independent of the civil or commercial nature of the contract and its national or international scope of application—the reception theory determines the moment the contract closes. These rules are a

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154. *See id.* art. 1808.

155. *Id.*

156. *Id.* art. 1809.

157. *Id.* art. 1810.

158. *Id.*

159. *Id.* art. 1811.

160. Reference, *infra*, TABLE 3(c): FORMATION OF THE ELECTRONIC CONTRACT: THE CONCLUSION.

161. *See* 1 MANUEL BORJA SORIANO, TEORÍA GENERAL DE LAS OBLIGACIONES 146–47 (7th ed. 1971).

result of the study and analysis of contract perfection in various national statutes, such as the CISG, and of the fact that contract criteria today is universally accepted.<sup>162</sup>

The UCC indicates that “a contract for the sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.”<sup>163</sup> This law indicates that “an agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.”<sup>164</sup> The UCC goes further in sustaining contract creation by indicating that, even when one or more terms are left open, a contract for sale does not fail for indefiniteness if there is a reasonable way of solving the controversy.<sup>165</sup>

The CISG requires more before granting validity to a contract. Generally, the CISG requires an offer and a valid acceptance before a contract is created. The contract is not valid until it has been perfected, and it is perfected at the moment an acceptance becomes effective in accordance with the CISG provisions.<sup>166</sup> Under the CISG, contract perfection is considered to occur when any “declaration of acceptance or any other indication of intention ‘reaches’ the addressee when it is made orally to him or delivered by any other means to him personally . . . .”<sup>167</sup>

UCITA similarly indicates that “a contract may be formed in any manner sufficient to show agreement, including offer and acceptance or conduct of both parties or operations of electronic agents that recognize the existence of a contract.”<sup>168</sup> It also indicates, in a manner similar to the UCC stipulation, that  
if the parties so intend, an agreement sufficient to  
constitute a contract may be found even if the

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162. Viscasillas, *supra* note 103, at 919–20. *But see id.* at 920, n.116 (noting that common law may apply either the mailbox rule or the reception theory to determine the precise moment of perfection).

163. U.C.C. § 2-204(1) (2002).

164. *Id.* § 2-204(2).

165. *Id.* § 2-204(3).

166. C.I.S.G., Apr. 10, 1980, 19 I.L.M. 671, art. 23.

167. *Id.* art. 24.

168. U.C.I.T.A. § 202(a) (2001).



time of its making is undetermined, one or more of its terms are left open or to be agreed on, the records of the parties do not otherwise establish a contract, or one party reserves the right to modify its terms.<sup>169</sup>

However, UCITA indicates that a contract has not been formed if there is disagreement over a material or principal term, including the contract's scope of application.<sup>170</sup>

UETA provides that "a record or signature may not be denied legal effect or enforceability solely because it is in electronic form" and extends the provision to prevent contract denial solely for electronic form.<sup>171</sup> UETA also establishes that if the "parties have agreed to conduct a transaction by electronic means and a law requires a person to provide . . . information in writing to another person, the requirement is satisfied if the information is provided, sent, or delivered . . . in an electronic record capable of retention by the recipient at the time of receipt."<sup>172</sup>

E-SIGN states that "the legal effectiveness, validity, or enforceability of any contract executed by a consumer shall not be denied solely because of the failure to obtain electronic consent or confirmation of consent by that consumer . . . ."<sup>173</sup>

In Mexico, in civil and commercial matters, a contract is formed the moment the offeror receives acceptance.<sup>174</sup> In 2000, the Mexican Commercial Code abandoned the theory of dispatch that originally prevailed.<sup>175</sup> Moreover, in business matters, if acceptance is communicated by electronic, optical, or other technological means, the time of acceptance is determined by the following: if the offeror has designated an information system for reception, the acceptance takes place the moment it enters such system; or in case the acceptance is sent to a system that is not the designated one for its reception or where there is no

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169. *Id.* § 202(b).

170. *Id.* § 202(d).

171. U.E.T.A. § 7(a)-(b) (1999).

172. *Id.* § 8(a).

173. 15 U.S.C. § 7001(c)(3).

174. *See* C.C.F. art. 1805 (Mex.); *see also* Cód.COM. art. 80 (Mex.).

175. *See* Cód.COM. art. 80.

information system available, the acceptance is considered received the moment the offeror obtains the information.<sup>176</sup>

#### V. ADDITIONAL OR DIFFERENT TERMS IN A CONTRACT<sup>177</sup>

Under the UCC, if the contract is between merchants, additional terms are to be construed as proposals for addition to the contract unless: the offer expressly limits acceptance to its terms; the added terms materially alter the contract; or notification of objection to the added terms is given within a reasonable time after alteration.<sup>178</sup> The additional terms should be construed only as proposals for additions to the contract.<sup>179</sup> When the conduct of both parties establishes existence of a contract, but the writings do not so indicate, the terms of the contract consist of those in agreed writings of the parties.<sup>180</sup>

The CISG, in contrast, provides that “a reply to an offer that purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.”<sup>181</sup> However, if changes or additions to the offer do not materially alter the terms of the offer, acceptance is valid unless the offeror, without undue delay, objects orally to the discrepancy or sends a notice to that effect.<sup>182</sup> “If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.”<sup>183</sup> The CISG considers that “additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party’s liability to the other, or the settlement of disputes . . . alter the terms of the offer materially.”<sup>184</sup>

Similarly, UCITA states, “an acceptance materially alters an

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176. *Id.* art. 91.

177. Reference, *infra*, TABLE 4: TERMS ADDITIONAL OR DIFFERENT FROM THE CONTRACT.

178. U.C.C. §§ 2-207(2)(a)–(c) (2002).

179. *Id.* § 2-207(2).

180. *Id.* § 2-207(3).

181. C.I.S.G., Apr. 10, 1980, 19 I.L.M. 671, art. 19(1).

182. *Id.* art. 19(2).

183. *Id.*

184. *Id.* art. 19(3).

offer if it contains a term that materially conflicts with or varies a term of the offer or that adds a material term not contained in the offer.”<sup>185</sup> If the acceptance materially alters the offer, a contract is not formed unless “a party agrees . . . to the other party’s offer or acceptance; or all the other circumstances, including the conduct of the parties, establish a contract.”<sup>186</sup> “If an acceptance varies from but does not materially alter the offer, a contract is formed based on the terms of the offer.”<sup>187</sup> Additionally, the “terms in the acceptance which conflict with terms in the offer are not part of the contract.”<sup>188</sup> “An additional nonmaterial term in the acceptance is a proposal for an additional term.”<sup>189</sup> Similar to the UCC, UCITA indicates that “between merchants, the proposed additional term becomes part of the contract unless the offeror gives notice of objection before, or within a reasonable time after, it receives the proposed terms.”<sup>190</sup>

According to UETA, “the effect of any of its provisions may be varied by agreement.”<sup>191</sup> Although E-SIGN does not contain any specific terms with regard to exchange of additional or different elements of the contract, E-SIGN does indicate that its application does not limit, alter, or otherwise affect any requirement imposed by a statute, regulation or rule of law.<sup>192</sup>

As mentioned previously, in Mexico, when acceptance is not plain and clear, or contains modifications to the offer, the offeror is released from his offer. In that instance, the response is considered a new offer and is governed by provisions of other related articles.<sup>193</sup>

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185. U.C.I.T.A. § 204(a) (2001).  
186. *Id.* §§ 204(c)(1)(A)–(B).  
187. *Id.* § 204(d).  
188. *Id.* § 204(d)(1).  
189. *Id.* § 204(d)(2).  
190. *Id.*  
191. U.E.T.A. § 5(d) (1999).  
192. 15 U.S.C. § 7001(b)(1).  
193. C.C.F. art. 1810 (Mex.).

VI. FORMS AND EVIDENCE OF A CONTRACT<sup>194</sup>

Some of the laws discussed here, though giving the parties ample liberty to establish the terms and requirements of their contracts, also require certain elements to be present in order to make a valid contract. Under the UCC, for example, the law requires that any contract for the sale of goods over \$500 be in writing and indicate at least the quantity because, in the event of a disagreement, a transaction is not considered valid for more than its indicated value even though the writing is not considered insufficient just because it omits or incorrectly states an agreed upon term;<sup>195</sup> this provision is known as the statute of frauds.<sup>196</sup> However, the UCC also permits parties to contract for sale even when the price is not settled.<sup>197</sup> In such cases, the court may determine what is a reasonable price under the contract by taking into account the market value of the goods.<sup>198</sup>

Under the UCC, for a writing between merchants to confirm a contract, it is sufficient to form that contract if it is received within a reasonable time and if the receiving party has reason to know its contents, unless a written notice of objection to its contents is given within ten days after it is received.<sup>199</sup>

The CISG does not require a contract of sale to be concluded in or evidenced by writing and is not subject to any other form requirement. The existence and validity of the contract "may be proved by any means, including witnesses."<sup>200</sup> The states whose legislatures require that contracts for the sale of goods be evidenced in writing may make a declaration indicating that neither Article 11 nor the exception to Article 29 will apply where any party has his place of business in that state.<sup>201</sup> The exception to Article 29 provides that, if a written contract contains a provision requiring any modification or termination to be in writing, it may not be otherwise modified or terminated

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194. Reference, *infra*, TABLE 5: FORM AND EVIDENCE OF THE CONTRACT.

195. U.C.C. § 2-201(1) (2002).

196. *Id.*

197. *Id.* § 2-305(1).

198. *Id.* § 2-305(1)(c).

199. *Id.* § 2-201(2).

200. C.I.S.G., Apr. 10, 1980, 19 I.L.M. 671, art. 11.

201. *Id.* arts. 12, 96.

by agreement.<sup>202</sup> “However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.”<sup>203</sup>

UCITA is a little stricter. This law indicates that any contract requiring payment of a contract fee of \$5000 or more is “not enforceable by way of action or defense unless: the party against which enforcement is sought authenticated a record sufficient to indicate that a contract has been formed . . . .”<sup>204</sup> However, a document satisfies this requirement even when “it omits or incorrectly states a term, but the contract is not enforceable beyond the number of copies or subject matter shown in the record” unless performance was tendered by one party and accepted by the other or if the party against which enforcement is sought admits in court that a contract was formed.<sup>205</sup>

Additionally, UCITA establishes that a record between merchants confirming the contract is sufficient to form the contract if it is received within a reasonable time and if the receiving party has reason to know its contents unless a written “notice of objection to its contents is given in a record within 10 days after the confirming record is received.”<sup>206</sup> The parties can agree that “the requirements of this section need not be satisfied as to future transactions . . . .”<sup>207</sup> The statute of frauds, as in U.C.C. § 2-201, of other laws does not apply to a transaction within the scope of UCITA.<sup>208</sup>

Alternatively, UETA indicates that “a record or signature may not be denied legal effect or enforceability solely because it is in electronic form.”<sup>209</sup> It also provides that “a contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation”<sup>210</sup> while E-SIGN

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202. *Id.* art. 12, 29(2).

203. *Id.* art. 29(2).

204. U.C.I.T.A. § 201(a)(1) (2001).

205. *Id.* §§ 201(b), (c)(1)–(2).

206. *Id.* § 201(d).

207. *Id.* § 201(e).

208. *Id.* § 201(f).

209. U.E.T.A. § 7(a) (1999).

210. *Id.* § 7(b)

authorizes the use of electronic signatures and records for contract formation related to interstate or foreign commerce.<sup>211</sup>

UETA also establishes that in an automated transaction, “a contract may be formed by the interaction of electronic agents of the parties, even if no individual was aware of or reviewed the electronic agents’ actions . . . .”<sup>212</sup> In accordance with this Act,

a contract may also be formed by the interaction of an electronic agent and an individual, acting on an individual’s own behalf or for another person, including by an interaction in which the individual performs actions that [he] is free to refuse to perform and which the individual knows will cause the electronic agent to complete the transaction or performance.<sup>213</sup>

Under UETA, an electronic agent “means a computer program or an electronic or other automated means used independently to initiate an action or respond to electronic records or performances in whole or in part, without review or action by an individual.”<sup>214</sup>

In Mexico, when civil and commercial legislation requires a written contract and a signature in the corresponding documents, these requirements are satisfied for electronic messages—information generated, sent, received, filed, or communicated through electronic, optical, or other technological means—as long as the information can be attributed to the obligated parties and the information is made available for later consultation. Where a juridical act must be given in a verified instrument, the verifying authority and the contractual parties are allowed to express the exact terms agreed to by the parties through electronic communications; the verifying authority must indicate the elements through which that information may be attributed to each party and keep an identical copy for later consultation according to any applicable law.<sup>215</sup> This is the basis

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211. 15 U.S.C. § 7001(a)(1).

212. U.E.T.A. § 14(1).

213. *Id.* § 14(2).

214. *Id.* § 2(6).

215. C.C.F. arts. 1834, 1834-bis (Mex.); *see also* Cód.COM. art. 90 (Mex.).

to start considering the existence and utilization of electronic protocol in the near future.

The Mexican Federal Code of Civil Procedure and the Mexican Commercial Code recognize the probative value of information generated, sent, received, or filed by electronic, optical, or other technological means. The trustworthiness of the method used to transmit is considered to estimate the probative value and, where possible, to attribute to the obligated parties the content of the respective information and make it accessible for later consultation.<sup>216</sup>

## VII. CONSIDERATION<sup>217</sup>

Consideration, as it is known in the English language, is a unique characteristic of American contract law. Although not expressly stated in statutory form, the common law indicates that a contract generally requires mutual consideration from the parties to be valid. There is no clear definition as to what consideration is. However, the courts seem to have uniformly adopted the definition suggested in *Allegheny College v. National Chautauqua County Bank*, indicating that consideration is sufficient if there is a legal detriment that induces the party to make the promise.<sup>218</sup>

One of the most controversial situations in American contracts with regard to consideration occurs when deciding if a promise alone is sufficient to form a contract. American common law uses the consideration doctrine to decide these cases. This doctrine requires that a contractual promise be made as a result of a negotiation.<sup>219</sup> Under this doctrine, negotiation refers to the voluntary acceptance of an obligation by one party conditioned upon an act or omission of the other.<sup>220</sup> Therefore, consideration assures that the promise enforced as part of the contract is not accidental, casual, or gratuitous but was made after deliberation

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216. C.F.P.C. art. 210-A (Mex.); see also COD.COM. arts. 1205, 1298-A.

217. Reference, *infra*, TABLE 6: CONSIDERATION.

218. See *Allegheny Coll. v. Nat'l Chautauqua County Bank of Jamestown*, 159 N.E. 173, 714 (N.Y. 1927).

219. *Baehr v. Penn-O-Tex Oil Corp.*, 104 N.W.2d 661, 665 (Minn. 1960).

220. *Id.*

manifested by reciprocal negotiation.<sup>221</sup>

The requirement of detriment indicates that the accepting party gives up something of value or circumscribes his liberty in some way.<sup>222</sup> In other words, the accepting party must suffer a legal detriment as part of the negotiation.<sup>223</sup> That is to say, the party offers its promise in exchange for what the other party sacrifices. The requirement of consideration invalidates two transactions: promises to make a gift, which do not satisfy the requirement of negotiation; and commercial promises in which one of the parties has not given consideration, even when circumstances appear to indicate otherwise.<sup>224</sup>

Although consideration plays an important role in regular contracts, in commercial transactions it is not a major concern since most commercial contracts are clearly bargained-for exchanges where the price for the promise is clearly identified.<sup>225</sup> Therefore, there are now very few cases in which a lack of consideration makes a promise unenforceable, especially in commercial transactions.<sup>226</sup>

## VIII. CONCLUSIONS

The modern era and the benefits offered by technological progress create an opportunity to carry out commercial transactions around the world with ease. At the same time, new problems and questions related to the appropriate manner to carry out modern transactions. Although modern law tends toward uniformity in laws and regulations of modern transactions, certain aspects of contract may still cause controversy.

One should remember that under U.S. common law the basic principle of contracts is the presumption that a contract is or is not carried out based on the decisions or actions of a

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221. *Id.*

222. *See id.*

223. *Id.*

224. *See* E. ALLAN FARNSWORTH, *CONTRACTS* §§ 2.5, 2.13 (3rd ed. 1999).

225. Arthur L. Rosett, *Fundamentals of Contract Law*, in 1 UNITED STATES LAW OF TRADE AND INVESTMENT 3-iii, 3-13 to 3-14 (Boris Kozolchyk & John F. Molloy eds., 2001).

226. *Id.* at 3-14.



person, either acting on his own behalf or someone else's. The convenience, computerized communication offers, threatens this basic principle because, obviously, computers do not have the capacity to think or evolve, even though, computers can work on their own within their programmed parameters. Essentially, computers are allowed to make decisions and respond to certain situations with or without human participation.<sup>227</sup>

In purely electronic transactions, the most important legal determination concerns the establishment of an offer and an acceptance through electronic messages absent written documentation and the human intervention of an automatic exchange. Also, electronic transactions create controversies over when the offer, acceptance, or rejection is effective.<sup>228</sup>

The means of electronic contract also create issues unique to this field in reference to the determination of whether a valid acceptance has taken place. Those issues confront the reality that U.S. common law of contracts assumes the decision to accept or reject an offer occurs through a person, or through the achievement of human decisions and discretion. The common law presumes that an effective acceptance should be communicated with knowledge of the offer and with the intent to accept. However, intent is measured through objective manifestations, not subjective ones. This means that one assumes that the person responding to an offer means what his expression indicates, unless circumstances clearly indicate otherwise. Therefore, in regular contract law, the excuse, "I did not mean to say what I said," does not carry much weight. Similarly, the excuse, "I did not mean to say what my computer said," might not be appropriate when characteristics of the electronic response are aimed at inducing the other party (or their computer) to believe they have formed a valid contract. Thus, the fact that a completely automatic acceptance takes place does not mean that there is not adequate acceptance of the electronic offer. In creating a contract, one deals with the apparent intention of the party establishing the electronic

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227. Raymond T. Nimmer, *Electronic Contracting: Legal Issues*, 14 J. MARSHALL J. COMPUTER & INFO. L. 211, 212 (1996).

228. *Id.* at 214.

system of acceptance.<sup>229</sup>

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229. *Id.* at 217.

TABLE 1: FIELD OF APPLICATION

1. Field of Application					
AMERICAN LAW			INT'L LAW	MEXICAN LAW	
U.C.C.	E-SIGN	UCITA	UETA	CISG	
<p>Article 2 applies to all transactions in goods with the following exceptions:</p> <p>1. It does not apply to transactions which are intended to operate as a security transaction. (§2-102).</p> <p>2. A contract for the sale of goods for the price of \$500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate such transaction . (§2-201(1)).</p>	<p>Applies to contracts, records, or signatures in or affecting interstate or foreign commerce. (§7001(a)).</p> <p>In states where the UETA has been adopted, it can be applied and used to replace the terms of the E-SIGN. (§7002(a)(1)).</p> <p>It does not apply in transactions related to will, codicils, or testamentary trusts or contracts regulated by the</p>	<p>This Act applies to computer information transactions related to the intention to create, modify, transfer, or authorize information in electronic form which is acquired through the use of a computer or in a way that could be processed by a computer. (§§ 102(a)(10)-(11), 103(a)).</p> <p>If a transaction includes computer information and goods, this Act applies to the part</p>	<p>Applicable to electronic records and electronic signatures relating to a transaction (§3(a)).</p> <p>Does not apply to transactions related to the creation and execution of wills, codicils, or testamentary trusts governed by article 2 of the UCC, the UCITA, or other laws specified by the state. (§3(b)).</p>	<p>Applicable to the sale of goods between parties whose place of business is in different states, when the States are Contracting States, or when the rules or private international law lead to the application of the law of a Contracting State. (art. 1.1).</p> <p>The fact that the parties have their place of business in different States is to be disregarded whenever this fact</p>	<p>Communications made through electronic, optical, or other technological means have juridical effect without the need of a previous written agreement; electronic communication has full probative value; the use of electronic signatures is permitted. (L.I.C. art. 52; L.M.V. art. 91; L.A.A.S.P. art. 27; L.O.P.S.R.M. art. 28; C.F.P.C. art. 210-A; C.C. arts. 21 bis, 30 bis,</p>

1. Field of Application (continued)					
AMERICAN LAW					
U.C.C.	E-SIGN	UCITA	UETA	INT'L LAW	MEXICAN LAW
<p>Applies only to contracts related to the present or future sale of goods. (§2-106(1)).</p> <p>Goods under this Code mean all things which are moveable such as unborn young of animals and growing crops. (§2-105(1)).</p> <p>In transactions which include the acquisition of goods and services, this article is applied only in those cases where the main intent of the buyer is to obtain the goods (<i>Perlmutter v. Beth</i></p>	<p>U.C.C., (§7003(a)(1)).</p>	<p>of the transaction involving computer information, informational rights in it, and creation or modification of it (§103(b)-(c)).</p> <p>It does not apply to a financial services transaction, an agreement to create, audio or visual programming, employment contracts, or contracts that do not require that information be furnished as computer information. (§103(d)).</p>		<p>does not appear in the contract. (art. 1.2)</p> <p>The nationality or commercial character of the parties is not taken into consideration. (art. 1.3).</p> <p>Does not apply to sales of goods bought for personal, family, or household use; by auction; on execution or otherwise by authority of law; of stocks, shares, investment securities, negotiable instruments</p>	<p>80, 91, 1205, 1298-A; L.F.P.A. art. 69; L.F.P.C. art. 76 bis.</p> <p><i>Note: the regulation of the process to obtain an electronic signature was recently passed and published in the Diario Oficial de la Federación on August 29, 2003. It will become effective 90 days after that date</i></p>

1. Field of Application (continued)					
AMERICAN LAW					
U.C.C.	E-SIGN	UCITA	UETA	INT'L LAW	MEXICAN LAW
<p><i>David Hospital</i>, 123 N.E.2d 792, 795 (N.Y. 1954).</p>		<p>Generally, and with several exceptions, a contract that requires a quote of \$5,000 is not valid under this Act, unless there is a document that proves the formation of the contract (§201(a)).</p>		<p style="text-align: center;"><b>CISG</b></p> <p>or money; ships, vessels, hovercrafts or aircrafts; and electricity. (art. 2).  Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the other party who ordered the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production. (art. 3(1)).  This Convention</p>	

1. Field of Application (continued)					
AMERICAN LAW			INT'L LAW	MEXICAN LAW	
U.C.C.	E-SIGN	UCITA	UETA	CISG	
				<p>does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services. (art. 3(2)).</p> <p>This Convention does not apply to the liability of the seller for death, or personal injury caused by the goods to any person. (art. 5).</p>	

TABLE 2: AUTONOMY OF PARTS

2. Autonomy of Parts (exclusions, exceptions, and modifications)						
AMERICAN LAW						
U.C.C.		E-SIGN	UCITA	UETA	INT'L LAW	MEXICAN LAW
When a transaction occurs between two states or two nations, the two parties can agree and choose the applicable law of the state or nation that applies to the contract. If there is no such agreement, the UCC is applied. (§1-301).  The effects this Act may be varied by agreement, except for the obligation of good faith, diligence, and reasonableness. (§1-302).	This law does not require the parties to agree to use electronic signatures in their transactions, with exception to government agencies with respect to a record other than a contract to which it is a party. (§7001(b)(2)).  If a statute, regulation, or other rule of law requires that information relating to a transaction be in writing, the consumer should	The parties in their agreement may choose the applicable law. However, the choice is not enforceable in a consumer contract to the extent it would vary a rule that may not be varied. (§109(a)).	This Act applies only when the parties have agreed to carry out the transaction by electronic means but the parties may refuse to carry out other transactions in this way. (§5(b)).	The parties may exclude the application of this Convention, or subject to article 12, derogate form or vary the effect of any of its provisions. (art. 6).	Information generated, sent, received, filed, or communicated through electronic, optical, or other technological means does not need previous stipulation between the contractual parties for it to have legal effect. (C.C.F. art. 1811; C.C. art. 80).	

2. Autonomy of Parts (exclusions, exceptions, and modifications) (continued)					
U.C.C.	AMERICAN LAW			INT'L LAW	MEXICAN LAW
	E-SIGN	UCITA	UETA	CISG	
	expressly consent to the application of this law. (§7001(c)(1)(A)).				



TABLE 3(a): FORMATION OF THE ELECTRONIC CONTRACT: THE OFFER

3(a). Formation of the Electronic Contract: The Offer					
AMERICAN LAW			INT'L LAW	MEXICAN LAW	
U.C.C.	E-SIGN	UCITA	UETA	CISG	
An offer written and made to a consumer for the selling of goods that indicates that the offer will be considered valid for a determined period, is irrevocable during that time or during a reasonable specified period. (§2-205).  The offer should invite the acceptance of the other party in any reasonable way under the circumstances. (§2-206(1)(a)).  An order or other offer to buy goods for prompt or current	This law does not contain a specific rule related to the offer, it only authorizes the use of electronic signatures or records for the formation of contracts relating to interstate or foreign commerce. (§7001(a)(1)).	Unless otherwise unambiguously indicated by the language or the circumstances, an offer to make a contract invites acceptance in any manner and by any medium reasonable under the circumstances. (§203(1)).  An order or other offer to acquire a copy for prompt or current delivery invites acceptance by either a prompt promise to ship or a shipment or a conforming or	This Act applies to any electronic record or signature created, generated, sent, communicated, received, or stored on or after the effective date of this Act. (§4).	A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provisions for determining the quantity and the price. (art. 14).	It must be distinguished whether the offer is made between parties physically present or absent, whether there is a set time period, and whether it was made through a telegraph or other electronic, optical, or other technological means. (C.C.F. arts. 1804, 1805, 1806, 1808, 1809, 1810, 1811).  <i>Note: when the law states "...any other electronic, optical, or other technological</i>

3(a). Formation of the Electronic Contract: The Offer (continued)					
AMERICAN LAW			INT'L LAW	MEXICAN LAW	
U.C.C.	E-SIGN	UCITA	UETA	CISG	
<p>shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt shipment of conforming goods. (§2-206(1)(b)).</p>		<p>nonconforming copy. (§203(2)).</p> <p>A conditional offer or acceptance precludes formation of a contract unless the other party agrees to its terms, such as manifesting assent. (§205(b)).</p>		<p>An offer becomes effective when it reaches the offeree. (art. 15(1)).</p> <p>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. (art. 15(2)).</p> <p>Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before or at the same time as the offer. (art. 16(1)).</p>	<p><i>means that allow the expression of the offer and acceptance in an immediate way", it must be remembered that, from a doctrinal perspective, immediacy cannot take place in communications via e-mail, fax, or telefax.</i></p>

<b>3(a). Formation of the Electronic Contract: The Offer (continued)</b>					
<b>AMERICAN LAW</b>				<b>INT'L LAW</b>	<b>MEXICAN LAW</b>
<b>U.C.C.</b>	<b>E-SIGN</b>	<b>UCITA</b>	<b>UETA</b>	<b>CISG</b>	
				<p>However, an offer cannot be revoked, if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or 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. (art. 16(2)).</p> <p>An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror. (art. 17).</p>	

TABLE 3(b): FORMATION OF THE ELECTRONIC CONTRACT: THE ACCEPTANCE

3(b). Formation of the Electronic Contract: The Acceptance					
AMERICAN LAW			INT'L LAW		MEXICAN LAW
U.C.C.	E-SIGN	UCITA	UETA	CISG	
An offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances. (§2-206(1)(a)).	When a statute, regulation, or other law requires that information relating to a transaction be in writing, the use of an electronic record satisfies the requirement that such information be in writing if the consumer has affirmatively consented to such use and has not withdrawn such consent. (§7001 (c)(1)(A)).	A person manifests assent to a record or term if the person, acting with knowledge of, or after having an opportunity to review the record or term or a copy of it authenticates the record or term with intent to adopt or accept it. (§112(a)(1)).	An electronic record is received when it enters an information processing system that the recipient has designated or uses for the purpose of receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record and it is in a form capable of being processed by that system. (§15(b)).	A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. (art. 18(1)).	It must be distinguished whether the acceptance is made between parties physically present or absent, whether there is a set time period, and whether it was made through a telegraph or other electronic, optical, or other technological means. (C.C.F. arts. 1804, 1805, 1806, 1808, 1809, 1810, 1811).
An order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or non-conforming goods, but such a shipment of non-conforming goods does not	Before consenting to the application of this Act, the	offeror that is not notified of acceptance or performance within	An electronic record is received even if no individual is aware of	An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. (art. 18(2)).	<i>Note: when the law states "...any other electronic, optical, or other</i>

3(b). Formation of the Electronic Contract: The Acceptance (continued)					
AMERICAN LAW					
U.C.C.	E-SIGN	UCITA	UETA	INT'L LAW	MEXICAN LAW
<p>constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer. (§2-206(1)(b)).</p> <p>A definite and seasonable expression of acceptance or a written confirmation which is sent within an reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless</p>	<p>consumer must be provided with a clear and conspicuous statement informing the consumer of any right or option of the consumer to have the record provided or made available on paper or in nonelectronic form, and the right of the consumer to withdraw the consent to have the record provided or made available in an electronic form and of any</p>	<p>a reasonable time may treat the offer as having lapsed before acceptance. (§203(3)).</p> <p>If an offer in an electronic message evokes an electronic message accepting the offer, a contract is formed when an electronic acceptance is received. (§203(4)(A)).</p>	<p>its receipt. (§15(e)).</p>	<p>as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in</p>	<p><i>technological means that allow the expression of the offer and acceptance in an immediate way”, it must be remembered that, from a doctrinal perspective, immediacy cannot take place in communications via e-mail, fax, or telefax.</i></p>

3(b). Formation of the Electronic Contract: The Acceptance (continued)					
AMERICAN LAW				INT'L LAW	MEXICAN LAW
U.C.C.	E-SIGN	UCITA	UETA	CISG	
acceptance is expressly made conditional on assent to the additional or different terms. (§2-207(1)).	conditions, consequences, or fees in the event of such withdrawal. (§7001(c)(1)(B)(i)).			the preceding paragraph. (art. 18(3)).  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. (art. 21(1)).	
				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	

3(b). Formation of the Electronic Contract: The Acceptance (continued)					
AMERICAN LAW				INT'L LAW	MEXICAN LAW
U.C.C.	E-SIGN	UCITA	UETA	CISG	
				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. (art. 21(2)).	

TABLE 3(c): FORMATION OF THE ELECTRONIC CONTRACT: THE CONCLUSION

3(c). Formation of the Electronic Contract: The Conclusion					
AMERICAN LAW				INT'L LAW	MEXICAN LAW
U.C.C.	E-SIGN	UCITA	UETA	CISG	
<p>A contract for the sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract. (§2-204(1)).</p> <p>An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined. (§2-204(2)).</p> <p>Even though one or more terms are left</p>	<p>The legal effectiveness, validity, or enforceability of any contract executed by a consumer shall not be denied solely because of the failure to obtain electronic consent or confirmation of consent by that consumer. (§7001(c)(3)).</p>	<p>A contract may be formed in any manner sufficient to show agreement, including offer and acceptance or conduct of both parties or operations of electronic agents which recognize the existence of a contract. (§202(a)).</p> <p>If the parties so intend, an agreement sufficient to constitute a contract may be found even if the time of its making is undetermined, one</p>	<p>A record or signature may not be denied legal effect or enforceability solely because it is in electronic form. (§7(a)).</p> <p>A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation. (§7(b)).</p> <p>If parties have agreed to conduct a transaction by electronic means and a law requires a person to provide, send, or deliver</p>	<p>A contract is perfected at the moment when an offer becomes effective in accordance with the provisions of this Convention. (art. 23).</p> <p>For the purposes of this Part of the Convention, an offer, declaration of acceptance or any other indication of intention "reaches" the addressee when it is made orally to him or delivered by any other means to him personally, to</p>	<p>In civil matters as well as in business matters, a contract is formed the moment the offeror receives the acceptance. (C.C.F. art. 1805; C.C. art. 80).</p> <p>In business matters, in case the acceptance is communicated through electronic, optical, or other technological means, the moment the acceptance is considered received is determined by the following rules:</p>



3(c). Formation of the Electronic Contract: The Conclusion (continued)					
AMERICAN LAW			INT'L LAW		MEXICAN LAW
U.C.C.	E-SIGN	UCITA	UETA	CISG	
<p>open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy. (§2-204(3)).</p>		<p>of more terms are left open or to be agreed on, the records of the parties do not otherwise establish a contract, or one party reserves the right to modify terms. (§202(b)).</p> <p>In the absence of conduct or performance by both parties to the contrary, a contract is not formed if there is material disagreement about a material term, including a term concerning scope. (§202(d)).</p>	<p>information in writing to another person, the requirement is satisfied if the information is provided, sent, or delivered in an electronic record capable of retention by the recipient at the time of receipt. An electronic record is not capable of retention by the recipient if the sender or its information processing system inhibits the ability of the recipient to print or store the electronic record. (§8(a)).</p>	<p>his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence. (art. 24).</p>	<p>a) If the offeror has designated an information system for reception, the acceptance takes place the moment it enters such system.</p> <p>b) In case the acceptance is sent to a system that is not the designated one for its reception or where there is no information system available, the acceptance is considered received the moment the offeror obtains the information</p>

TABLE 4: TERMS ADDITIONAL OR DIFFERENT FROM THE CONTRACT

4. Terms Additional or Different from the Contract					
AMERICAN LAW			INT'L LAW		MEXICAN LAW
U.C.C.	E-SIGN	UCITA	UETA	CISG	
<p>The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless: the offer expressly limits acceptance to the terms of the offer; they materially alter it; or notification of objection to them has already been given or is given within a reasonable time after notice of them is received. (§2-207(2)).</p> <p>Conduct by both parties which</p>	<p>Not applicable on this issue, but it does indicate that this Act does not limit, alter, or otherwise affect any requirement imposed by a statute, regulation, or rule of law relating to the rights and obligations of persons under such law. (§7001(b)(1)).</p>	<p>A definite and seasonable expression of acceptance operates as an acceptance, even if the acceptance contains terms that vary from the terms of the offer, unless the acceptance materially alters the offer.</p> <p>(§204(b)).</p> <p>If an acceptance materially alters the offer, a contract is not formed unless a party agrees to the other party's offer or acceptance or all the other circumstances,</p>	<p>The effect of any of this Act's provisions may be varied by agreement. (§5(d)).</p>	<p>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. (art. 19(1)).</p> <p>However, a reply 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</p>	<p>The offeror is released from his offer if the acceptance is not clear and plain, but contains modifications to the offer. In that case, the response is considered a new offer and is governed by the provisions of correlated articles. (C.C. art. 1810).</p>

4. Terms Additional or Different from the Contract (continued)					
AMERICAN LAW			INT'L LAW	MEXICAN LAW	
U.C.C.	E-SIGN	UCITA	UETA	CISG	
<p>recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. (§2-207(3)).</p>		<p>including the conduct of the parties, establish a contract. (§204(c)). If an acceptance does not materially vary from but alter the offer, a contract is formed based on the terms of the offer but the terms in the acceptance which conflict with the terms in the offer are not part of the contract and an additional nonmaterial term in the acceptance is a proposal for an additional term. (§204(d)).</p>		<p>the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance. (art. 19(2)). Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and</p>	

4. Terms Additional or Different from the Contract (continued)					
AMERICAN LAW					MEXICAN LAW
INT'L LAW					
U.C.C.	E-SIGN	UCITA	UETA	CISG	time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially. (art. 19(3)).

TABLE 5: FORM AND EVIDENCE OF THE CONTRACT

5. Form and Evidence of the Contract						
AMERICAN LAW					INT'L LAW	MEXICAN LAW
U.C.C.	E-SIGN	UCITA	UETA	CISG		
A contract for the sale of goods for the price of \$500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by its authorized agent or broker. (§2-201(1)) (This provision is known as the Statute of Frauds).	Authorizes the use of electronic signatures and record for the formation of contracts related with interstate or foreign commerce. (§7001(a)(1)).	A record is sufficient even if it omits or incorrectly states a term, but the contract is not enforceable under that subsection beyond the number of copies or subject matter shown in the record. (§201(b)).	A record or signature may not be denied legal effect or enforceability solely because it is in electronic form. A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation. (§7(b)).	A contract of sale need not be perfected in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses. (art. 11).		When the civil and business legislation require a written contract and a signature in the corresponding documents, these requirements are considered met in the case of electronic messages (information generated, sent, received, filed, or communicated through electronic, optical, or other technological means) as long as the information can be attributed to the obligated parties and the
A contract which		A contract that does not satisfy the requirements is nevertheless enforceable if a performance was tendered or the information was made available by one party and the tender was accepted		A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement.		

5. Form and Evidence of the Contract (continued)					
AMERICAN LAW			INT'L LAW		MEXICAN LAW
U.C.C.	E-SIGN	UCITA	UETA	CISG	
<p>does not satisfy the requirements of § 2-201(1) but which is valid in other respects is enforceable. (§2-201(3)).</p> <p>Between merchants, if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements against such party unless written notice of objection to its</p>		<p>or the information accessed by the other. (§201(c)).</p> <p>Between merchants, a document received within a reasonable time in confirmation of the contract and of which the receiving party has reason to know its contents, is sufficient to form a contract unless notice of objection to its contents is given in a record within a reasonable time after the confirming record</p>		<p>However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct. (art. 29(2)).</p> <p>Any provision of article 11, or article 29 of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form</p>	<p>information is made available for later consultation. (C.C.F. arts. 1834, 1834 bis; C.C. art. 90).</p> <p>As far as probative value is concerned, the Mexican Federal Code of Civil Procedure as well as the Mexican Commerce Code recognize the probative value of information generated, sent, received, filed, or communicated through electronic, optical, or other technological</p>

<b>S. Form and Evidence of the Contract (continued)</b>					
<b>AMERICAN LAW</b>					
<b>U.C.C.</b>	<b>E-SIGN</b>	<b>UCITA</b>	<b>UETA</b>	<b>INT'L LAW</b>	<b>MEXICAN LAW</b>
<p>contents is given within 10 days after it is received. (§2-201(2)).</p> <p>The parties, if they so intend, can conclude a contract for sale even though the price is not settled. (§2-305(1)).</p>		<p>is received. (§201(d)).</p> <p>An agreement that the requirements of this section need not be satisfied as to future transactions is effective if evidenced in a record authenticated by the person against which enforcement is sought. (§201(e)).</p> <p>A transaction within the scope of this Act is not subject to a statute of frauds contained in another law of this State. (§201(f)).</p>		<p>other than in writing does not apply where any party has his place of business in a contracting State which has made a declaration under this Convention. (art. 12).</p>	<p>means and, where possible, attribute to the obligated parties the content of the respective information and make it accessible for later consultation. (C.F.P.C. arts. 210-A; C.C. arts. 1205, 1298-A).</p>

TABLE 6: CONSIDERATION

6. Consideration					
AMERICAN LAW				INT'L LAW	MEXICAN LAW
U.C.C.	E-SIGN	UCITA	UETA	CISG	
<p>Contracts should be backed by certain consideration in order to be valid.</p> <p>The common law indicates that to be valid under the law, all promises should be backed by consideration.</p>	Not applicable.	Not applicable.	Not applicable.	Not applicable.	