B. Uncertainty of Time of Dispatch

If the time of dispatch cannot be determined (e.g. through the record of transmission), the date indicated on the offer (e.g. on a letter) becomes relevant pursuant to sentence 2 ‘unless the circumstances indicate otherwise’ (e.g. a date after the arrival date). In such case, it may be possible to calculate the time of dispatch from the arrival date and to apply sentence 1.

Article 2.1.9

(Late acceptance. Delay in transmission)

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

(2) If a communication containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without undue delay, the offeror informs the offeree that it considers the offer as having lapsed.

A. Principle (Para. 1)

In line with Art. 21 CISG and various laws around the globe, para. 1 grants an effect to a late acceptance. Like a new offer, and except for transmission errors (para. 2), para. 1 creates an option (limited in time, ‘without undue delay’) to the (initial) offeror who remains the master of the contract formation. The extent of the acceptable time to respond by notice (Art. 1.10) requires due regard to the circumstances in light of the general duty of good faith and fair dealing (Art. 1.7). The burden of proof is upon the party who wishes to rely on the contract formation.

B. Exception (Para. 2)

In cases of (recognizable, irregular) delay in transmission (which are not attributable to the offeree) a late acceptance creates a duty to speak up upon the offeror if it wants to avoid contract formation. If it does not do so, the acceptance creates the contract. Beyond the wording (even if the communication does not ‘show’ the lateness), in light of the general duty of good faith (Art. 1.7) para. 2 applies also when the offeror

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6 Official Comments, Art. 2.1.8, p. 47; Vogenauer/Anderson Art. 2.1.8 no. 4.
7 Vogenauer/Anderson Art. 2.1.8 no. 4.
1 Official Comments, Art. 2.1.9 no. 2, p. 48; Morán Bovio/Viscasillas Art. 2.9 no. 1, 2b, p. 138 et seq.
2 Vogenauer/Anderson Art. 2.1.9 no. 2.
3 Morán Bovio/Viscasillas Art. 2.9 no. 1, p. 137; Vogenauer/Anderson Art. 2.1.9 no. 3-4.
4 Vogenauer/Anderson Art. 2.1.9 no. 6 (with a critical view on the inaccurate German version).
5 Vogenauer/Anderson Art. 2.1.9 no. 5; cf. also Ferrari/Kieninger/Mankowski/Mankowski Art. 21 no. 9.
6 Vogenauer/Anderson Art. 2.1.9 no. 7, 13.
7 Vogenauer/Anderson Art. 2.1.9 no. 11 (arguing for a limited duty of inspection of the envelope by the offeror).
8 Vogenauer/Anderson Art. 2.1.9 no. 10.
9 Official Comments, Art. 2.1.9 no. 3, p. 48.
10 Vogenauer/Anderson Art. 2.1.9 no. 9.
11 Vogenauer/Anderson Art. 2.1.9 no. 12.