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Draft Convention on the Use of Electronic Communications in International Contracts

Compilation of comments by Governments and international organizations

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Preamble of the Convention

1. It is important to include the preamble presented in the working document WP.110 (A/CN.9/WG.IV/WP.110) in the draft Convention since it explains what the international community is actually looking for: freedom of choice and medium interchangeability and relevant technology, to the extent that the selected means allow for the objectives of the relevant legislation in this area to be reached.

2. The preamble, in particular paragraph 5, states the international desire to broaden the use of information technologies without creating parallel legal regimes based on the technology used. Moreover, it is a logical extension of the principle of technological neutrality and functional equivalence submitted by UNCITRAL. It emphasizes the consequences of these principles, meaning if various methods can produce functionally equivalent results, the same rules of law should apply to all these methods. Different methods are therefore interchangeable, to the extent that they lead to the results set out by law.

3. In short, this part of the preamble shows that information technologies should be considered means of communicating and that their use does not change the core values of the law, nor should it. Technologies can be seen as serving the law and justice.

Reliability of electronic signatures

4. This comment relates to subparagraph 9 (3)(b), the requirement that an electronic signature method must be "as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances." In our view, this reliability test will do more harm than good. It does not create certainty, but rather reduces it, and thus runs counter to the purpose of the draft Convention.

5. The Working Group on Electronic Commerce considered deleting the reliability condition, at its forty-fourth session. However, the Working Group decided to retain the provision (A/CN.9/571, paragraphs 127 and 128).

(a) Principles

6. The core principles of UNCITRAL in the field of electronic commerce are technological neutrality and functional equivalence. According to these principles, the goal is not to create a new parallel legal regime but to integrate communications through technological means into the existing regime. Standards have been created so that such communications are recognized in our legislation. It would therefore be preferable not to have different rules for communications through different means.

7. The text proposed at article 9 contravenes these principles. It specifically creates a double legal regime for signatures. In both common law and civil law legal traditions, the notion of signature does not include a reliability test. A signature is simply the distinctive mark that a person regularly uses to signify his or her intention. Traditionally, that notion does not include a reliability test. Such test should not be imported because electronic means are used to affix such a mark. Doing so would create a double legal regime for signatures, which would only bring confusion in the law and would create another obstacle to the use of electronic communication. We believe that this result is not desirable.

(b) The issue: the reliability test is not sufficiently flexible

8. It is sometimes said that "a signature has to be reliable". The question is who decides whether it is reliable: the person who chooses to rely on it, or someone outside the transaction in which it was used. The draft Convention is limited to contracts between businesses. No consumers are involved. Business parties should be able to choose what they will rely on, just as they decide who to do business with—an even more important decision. The party relying on a signature, whether handwritten or electronic, takes the risk that the signature is not valid or that it is a forgery. It is up to the relying party to decide what evidence it needs to support reliance. Sometimes it may be a particular technology; another time it may be the presence of a notary or trusted witness; another it may be the content of the contract itself that shows persuasively (reliably) that it came from the party purporting to sign.

9. No single factor suits all cases. The draft Convention appears to recognize this in its reference to "all the circumstances". The difficulty is that the evaluation of these circumstances, and thus the decision on what is reliable, is given to a court, not to the parties. The agreement of the parties is relevant, but a court can overrule it, based on circumstances. Who knows the circumstances better than the parties to the transaction? Who is better placed to estimate the business and legal risk of relying on the method used?

(c) Difficulties in applying the reliability test in practice

10. We are concerned about two situations. In the first, one of the parties to a transaction in which a signature is required tries to escape its obligations by denying that its signature (or the other party's signature) was valid—not on the ground that the purported signer did not sign, or that the document it signed has been altered, but only on the ground that the method of signature employed was not as reliable as appropriate in the circumstances. In other words, the language of the draft Convention permits a bad-faith undermining of the contract.

11. Some may argue that the previous situation is unlikely to happen given the difficulty to prove an intention or facts contrary to one's own acts. However, the conclusion would be different in cases where third parties are involved. Business transactions offer many situations where a third party, not involved in the transaction, has an interest in having the transaction held invalid. One thinks of creditors with claims on the assets of one of the parties, or a trustee in bankruptcy, or a government regulator. The draft Convention would allow a court to invalidate a transaction at the suit of a third party, on the ground of insufficient reliability of the signature, even if the parties have proved the act of signing as a matter of fact. The

law can make the fact irrelevant. In our view, setting up a test of reliability that is independent of the will of the parties and independent of the fact of signature creates uncertainty about the validity of an electronic signature. Nothing is gained in return for this uncertainty. In most business-to-business transactions, the only parties whose views on reliability should count are the parties to the transaction.

(d) Historical perspective on proposed article 9

12. Subparagraph 9 (3)(b) of the draft Convention is taken almost verbatim from subparagraph 7 (1)(b) of the Model Law on Electronic Commerce. It is important to note, however, that when that provision was first drafted, the Model Law contained a rule attributing signed data messages to the purported signer. If the law is going to presume attribution, then that attribution has to rest on a standard of reliability. However, the final text of the Model Law is somewhat different. Current article 13 of the Model Law on Electronic Commerce gives no particular effect to a signature. The reliability test is thus not needed. Several national laws implementing the Model Law on Electronic Commerce have not incorporated a reliability test, notably the American and Canadian implementations. Those countries that have adopted it do not appear to have judicial interpretations to show how it will work.

13. It is worth noting that the European Union Directive of 1999 on Electronic Signatures does not have a reliability test. On the contrary, it prohibits Member States from discriminating against any signature method on the sole ground that it is in electronic form. The Directive gives special legal status—equivalence to a handwritten signature—only to what it calls ‘advanced electronic signatures’, but it allows legal effect to others. It is up to the parties to prove who signed a particular document, but once they prove this, they need not prove anything special about the method of signature itself.

14. The Working Group tried in 1997 and 1998 to devise an attribution rule to accompany its prescription of a standard of reliability. It decided after considerable effort to abandon the attempt. There were too many variables of commercial practice and technologies, not to mention desired legal results.

15. It is one thing to put a technology-based test like the reliability test into a model law, where implementing countries can decide whether to take it or not, and they can amend it relatively easily if it does not work or if the technology evolves. It is far less desirable to put such a test into a convention that States either adopt or not, without modification, and which is extremely difficult to change once it is made.

(e) The public need for a trustworthy signature

16. It may be thought that the law may require a signature at times to ensure that the identification of the parties or the expression of consent is trustworthy, to protect a party or a public interest. In our view, the simple reliability test of the draft Convention is not adequate to serve this purpose. It is too flexible, too tied to the circumstances of the case. If public policy requires reliability for a particular purpose, it has to set a more precise standard of reliability for that purpose.

17. In short, the reliability test in subparagraph 9 (3)(b) of the draft Convention is too strict for business purposes, and too flexible for regulatory purposes. It does however create a potential and unpredictable risk for consensual business

transactions. This is contrary to the purpose of the draft Convention and could constitute an obstacle to its acceptance. We submit that it should be deleted.

Presumption relating to the time of dispatch of an electronic communication

18. The current proposed wording for paragraph 10 (3) of the draft Convention says that a communication "is deemed to be received" at particular places. In our view, the rule here should be a presumption, rebuttable by the appropriate evidence. We propose therefore that the word "deemed" should be replaced by "presumed" in that paragraph. We believe that UNCITRAL's standard usage of the words of presumption refer to a rebuttable presumption. In the case of any doubt, this interpretation should be spelled out in the text or in a commentary, but in any event the words of presumption should be in the text. A similar change should also be incorporated in paragraph 10(4).

Final Provisions

(f) Territorial units provision

19. Working Document WP.110 (A/CN.9/WG.IV/WP.110) also proposes a territorial unit extension provision. The wording of the provision as initially proposed included a reference to territorial units in which different systems of laws exist according to the State's constitution. It is understood that this provision is based on wording that was elaborated decades ago and that new provisions pertaining to this subject, such as the UN Convention on the Assignment of Receivables in International Trade and the UNIDROIT Cape Town Convention, do not make reference to State's Constitution. In light of these developments, we are of the view the words "according to its constitution" should not be referred to in the territorial unit extension provision.

(g) Amendment procedure

20. The Government of Canada is of the view that the amendment procedure to the Convention, as contemplated under article 21 of Working Document WP.110 (A/CN.9/WG.IV/WP.110), is not desirable as it would effectively impose new obligations on States which may not have agreed to the amendments. In addition, the amendment procedure may cause difficulties for States that have to adopt international texts into domestic legislation. We are therefore of the view that any amendment to the Convention should be binding on States expressing the desire to be bound by conventional means.