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**United Nations Commission
on International Trade Law**Thirty-eighth session
Vienna, 4-15 July 2005**Draft convention on the use of electronic communications in
international contracts****Comments received from Member States and international
organizations**

Note by the Secretariat

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I. Introduction

1. At its thirty-seventh session (New York, 14-25 June 2004) the United Nations Commission on International Trade Law encouraged Working Group IV (Electronic Commerce) to complete the preparation of a draft convention dealing with selected issues of electronic contracting with a view to enabling its review and approval by the Commission in 2005.¹
2. The Working Group approved the draft convention on the use of electronic communications in international contracts at its forty-fourth session (Vienna, 11-22 October 2004). By a note verbale dated 29 December 2004 and a letter dated 26 January 2005, the Secretary-General transmitted the text of the draft convention (A/CN.9/577) and the report of the Working Group on that session (A/CN.9/571) to States and to intergovernmental and international non-governmental organizations that are invited to attend the meetings of the Commission and its working groups as observers. A short summary of the deliberations of Working Group IV, as well as explanatory notes on the draft convention, were issued separately (A/CN.9/577/Add.1).
3. The present document reproduces the first comments received by the Secretariat on the draft convention on the use of electronic communications in international contracts. Comments received by the Secretariat after the issuance of the present document will be published as addenda thereto in the order in which they are received.

II. Comments received from Member States and international organizations

A. Member States

Egypt

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1. Background

1. Electronic commerce occupies a prominent place in the concerns of the United Nations Commission on International Trade Law (UNCITRAL). A working group has therefore been formed to deal with legal matters concerning electronic commerce.
2. This group has, at its forty-four meetings, worked hard to produce a number of documents relating to electronic commerce, including the draft convention on the use of electronic communications in international contracts. The group started work on that convention in March 2002, continuing until October 2004. As UNCITRAL wished to produce an exemplary form of this draft, it sent it to all the authorities and countries concerned, the aim being to receive their remarks so that these could be

¹ *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 17 (A/59/17)*, para. 71.

used at the thirty-eighth session of the Commission, to be held in Vienna in July 2005.

2. Preliminary remarks

3. We can only begin by praising the efforts made by the working group so that this project could reach its current form. In fact, anyone keeping abreast of the work of UNCITRAL will inevitably notice how those in charge of the group have striven to tackle not only every new aspect in the field of international trade, but also the scientific work, which was carried out rapidly and in a well-organized way with the aim of providing the appropriate legal procedures and forms for that trade.

4. It is also worth noting that major efforts are always being directed towards the channels of international cooperation and the facilitation of international trade, especially as UNCITRAL, ever since it was set up, deserves credit for embracing an established doctrine whose underlying idea is that one of the main ways of encouraging international trade consists of establishing standard international material rules in such a manner that they are always the best aid to ensuring the flow and development of international trade on the basis of equality and mutual benefit.

5. We would also like to point out here that our praise of the work of UNCITRAL can be attributed to the fact that we appreciate the difficulty of establishing standard international rules on the subject of private law, which is applied by the local courts of justice, because of the way in which this can be incompatible, firstly, with local rules that give commands, secondly, with matters of public order and, thirdly, with general policy.

6. We are therefore able to observe that UNCITRAL has adopted an intelligent and judicious approach in that the convention does not cover international non-contractual obligations, which give rise to a large number of differences of opinion and widely varying views. UNCITRAL has contented itself with international contractual obligations, so that the part concerning contractual obligations can be completed as a first step. This, we believe, is then followed by the difficult part, which relates to non-contractual obligations. If these two parts of the work are completed, we shall have complete legal coverage of electronic commercial relations.

7. Concern with electronic commerce lies at the heart of concern with international trade. This is because electronic commerce opens up those wide horizons for international trade that we could not have achieved without modern means of communication. This reaches the stage where new parties and markets are given opportunities for embarking upon international trade. In addition, electronic commerce plays a part in reducing the expense of international trading activities.

8. This is the reason why UNCITRAL became involved in the matter in its desire, firstly, to overcome the legal obstacles that hinder the launching of electronic commerce and, secondly, to fill the gaps in local legal systems, as well as the uncertainty that those gaps may cause to partners to the transactions when it comes to the rules to be followed.

9. We also note that the draft attempts to give the contracting parties the freedom to use an appropriate form of a technological medium whose nature is constantly changing, as long as the parties do not violate the applicable legal rules.

10. We conclude these preliminary remarks by referring to the logical attempt that those who drew up the draft convention undertook to ensure that the standard rules set forth in it will provide appropriate legal solutions to problems arising from the use of electronic communications in international contracts, with due consideration being given to the different legal and economic systems to be found in different countries.

Chapter I. Sphere of application

Article 1. Scope of application

11. In determining the scope of application, the draft, operating in a favourable way, requires that electronic communications be used in concluding or implementing a contract or agreement between parties from different States, on condition that those different States should be apparent from the contract or from any dealings between the parties, irrespective of the nationality of the parties or of whether the contract is of a civil or a commercial character.

12. The Working Group, in connection with that article, inquired about the necessity of providing an explanation, in an additional comment, on the subject of what was meant by the two terms “contract” and “agreement”. We therefore consider it appropriate—taking into account the precision of the two terms and the difference in their meanings in some international systems—that this explanation should be added.

Article 2. Exclusions

13. The draft excludes from its application—in a manner with which we disagree—the use of electronic communications in:

- (a) Contracts concluded for personal, family or household purposes;
- (b) Transactions on a regulated exchange;
- (c) Foreign exchange transactions, inter-bank payment systems, transfer of security rights and transfer of economic assets;
- (d) The transfer of security rights in sale, loan, holding of or agreement to repurchase securities or other financial assets or instruments held with an intermediary;
- (e) Some international commercial tools, such as bills of exchange, promissory notes, consignment notes, bills of lading, warehouse receipts, or any transferable document or instrument that entitles the bearer or beneficiary to claim the delivery of goods or the payment of a sum of money.

14. In this matter, it is important to us to refer to our understanding of how financial and economic activities are excluded by reason of their particular circumstances. This matter needs to have a specific convention devoted to it. However, for the reasons below it is difficult for us to accept that personal contracts and some of the international commercial mechanisms should be excluded. As regards personal contracts, they represent a part of the volume of electronic commerce, or rather it can be said that natural persons are those most in need of being included in the international organization because they are the party that is the least capable of international movement, has the least material strength and is the

most ignorant of the rules of international trade. Their knowledge of the international material rules that regulate the dealings of the international organization will therefore encourage them to conduct electronic commercial dealings. This will reflect positively upon international trade.

15. However, if the reason that induced those who drew up the convention to adopt this approach is that personal contracts may involve the application of rules that give commands in local legislation with regard to some issues such as the rights of the consumer, then it may be appropriate to start adopting unconventional ideas and tools with respect to contracts of this type.

16. On this subject, we propose that a draft international convention be drawn up to cover these contracts, while showing appropriate sensitivity to local rules that give commands, with a non-judicial, electronically managed mechanism—known as “electronic arbitration”—being devised for the settlement of disputes at all stages: allegation, investigation, negotiation and settlement. For this mechanism to be successful, it must be materially managed and supported under an international umbrella that ensures that the mechanism is impartial and that the provisions of the convention include objective and procedural rules that the mechanism will follow in achieving transparency and natural expectation, so as to avoid the defects that have become apparent from the experience of bodies currently dealing with electronic arbitration.

17. As regards international commercial mechanisms, we do not believe that it was justifiable to exclude some mechanisms that play a pivotal role in international commerce. In our view it is logical that these mechanisms need to be fast and cost-effective and that this is made possible by electronic communication, especially as most of these mechanisms are especially well accepted by traders in various communications media and international trade law has always made pioneering efforts to accept unconventional or unofficial forms of dealings.

Article 3. Party autonomy

18. The draft convention naturally, logically and successfully gives the parties to the contract the freedom to choose to apply all, some or none of the provisions of the convention. We shall not dwell long upon this article, because it is not disputed that it is vital and important to the functioning of international trade.

Chapter II. General provisions

Article 4. Definitions

19 As is usual in modern conventions, especially those dealing with technological advances, the draft has devoted this article to definitions explaining the meaning of each of the following: “communication”, “electronic communication”, “data message”, “originator”, “addressee”, “information system”, “automated message system” and “place of business”.

20. We would like to point out here that all the earlier and later advanced means of communication are to be brought together under the banner of the convention, with the door also being left open for similar means of communication that may appear in future.

21. There is another important point, namely, the matter of excluding intermediaries in electronic communications when it comes to determining the originator and the addressee, and this is in order to prevent any confusion or interference as regards responsibility.

22. Finally, “place of business” has been defined as the “place where a party maintains a non-transitory establishment to pursue economic activity other than the temporary provision of goods and services out of a specific location”.

Article 5. Interpretation

23. This article calls for the provisions of the convention to be interpreted having regard to its international character and the need to promote uniformity in its application and the observance of good faith in international trade.

24. If the convention does not include a particular provision, then the article refers to the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

Article 6. Location of the parties

25. The draft has deemed that a party’s place of business is presumed to be the location indicated by that party and has placed upon the other party the burden of proving the contrary.

26. The Working Group, in connection with this article, inquired about the extent to which it is advantageous to state anything to the effect that what is meant by “place of business” should be in compliance with the provision of the first paragraph above. We do not see any need for this.

27. If there is more than one place of business, the draft takes as the norm the place of business that has the closest relationship to the relevant contract, having regard to the circumstances known to the parties at any time before or at the conclusion of the contract.

28. If a natural person does not have a place of business, the draft states that reference is to be made to the person’s habitual residence.

29. In a manner that reflects the way in which the draft takes into account the nature of modern communications, it has, in defining the place of business, excluded the location in which the information systems are situated and also the location in which they can be installed.

30. In forming a connection that takes into account the special nature of those media, the draft has paid no attention to whether one of the parties owns a domain name or an electronic mail (e-mail) system that is linked to a particular country and is the only connection to that party’s place of business.

Article 7. Information requirements

31. This article refers to the fact that nothing in the convention affects the application of any rule of law that may require the parties to disclose their identities or their places of business, or relieves a party from the legal consequences of making inaccurate or false statements in that regard.

Chapter III. Use of electronic communications in international contracts

Article 8. Legal recognition of electronic communications

32. This article grants recognition of electronic contract, so that its validity cannot be denied on the sole ground that it is in the form of an electronic communication, while attention is drawn to the fact that its use or acceptance is linked to the volition of the parties.

33. In connection with this article, the Working Group asked whether it might be advantageous to add a phrase concerning contracts that result from the exchange of modern communications (in addition to making mention of contracts that are electronic in form). We consider that the addition of such a phrase will be beneficial to the formulation.

Article 9. Form requirements

34. In continuing the approach adopted by the draft in not being restricted to a specific technological method, the draft did not impose a condition requiring that the communication or contract should have any particular form, but required that an electronic communication was to be granted the same credibility as a written communication and that the information contained therein was to be accessible so as to be usable for subsequent reference. Where a written signature is required or the original of the document must be kept, the draft deemed that the electronic version of the document had the same status if that version fulfilled a number of requirements and guarantees set forth in the article.

Article 10. Time and place of dispatch and receipt of electronic communication

35. It can be confirmed that the approach that the draft has adopted in this article is a sound and logical approach that takes into account the nature of electronic communication:

(a) The draft has taken the time of dispatch as being the time when the communication leaves the information system of the originator or of the party who sent it on behalf of the originator; otherwise, the time of dispatch is the time when the communication is received;

(b) As regards the time of receipt, the draft has deemed it to be the time at which the addressee becomes capable of retrieving the communication (the message is considered to be retrievable when it reaches the addressee's e-mail address) at the e-mail address he has designated. If the communication reaches the addressee at a different e-mail address, the time at which the addressee becomes aware that the communication was sent to that address is to be taken as the time of receipt.

36. The draft considers that the communication has been received or dispatched at the place of business of the addressee or originator and in this respect the draft does not regard it as significant that the information system is located elsewhere. The draft attempted to provide this controlling provision in order to avoid assumptions that could be created by the possibility of accessing information systems from anywhere in the world, if appropriate electronic communication exists. This possibility arouses controversy as regards both the applicable law and the competent judicial authority.

Article 11. Invitations to make offers

37. The unique nature of electronic dealings has made it necessary for the home pages of electronic sites to carry announcements and proposals to conclude a contract. A dispute has arisen as to whether such announcements are proposals to conclude a contract or are merely invitations to make offers. If they are considered proposals to conclude a contract, then the liability of companies and businesses will be limitless, especially when there are a number of restrictions regarding some types of goods or regarding the purchaser's age, nationality or place of residence (for example, when the goods are of limited value, a company may not object to delivering them free of charge in a specific geographical area, while in another and distant area this might represent a huge loss to the company).

38. The draft has therefore avoided these problems by deeming that these announcements and home pages of electronic sites are merely invitations to make offers.

Article 12. Use of automated message systems for contract formation

39. In this article, the draft has gone along with the spirit of the times by confirming that it is not permissible to deny the validity of contracts that have been formed by the interaction of an automated message system and a natural person, irrespective of whether the contract is between a natural person and a system or between a system and another system.

Article 13. Availability of contract terms

40. This article has ensured the implementation of any legal provision that makes it necessary to grant contractual terms to the other party, together with the legal consequences of doing so.

Article 14. Error in electronic communications

41. With a view to avoiding any errors that may conceivably occur in electronic contracting, the draft has dealt with this possibility by permitting the party that has made an input error in an electronic communication to correct that error, on the ground that that system does not provide the person with an opportunity to correct the error. The draft has therefore imposed the condition that that party, as soon as it knows that the error has occurred, must firstly notify the other party as soon as possible and secondly take reasonable steps in order to return the goods or services received or to destroy the goods or services without receiving any material benefit from them. Thus we praise this legislative approach and dwell here on one point relating to the "destruction" referred to in this article. We are astonished at this leap which electronic communications have brought about and in which the destruction of a commodity that has been handed over electronically has been proposed as an alternative to retrieving that commodity.

Chapter IV. Final provisions

42. Articles 15-23 of this chapter contain provisions relating to the depositary, signature, ratification, acceptance, participation by regional economic integration organizations, effect in domestic territorial units, declarations on the scope of application, communications exchanged under other international conventions,

procedures and effects of declarations, reservations, amendments, entry into force, transitional rules and denunciations.
