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Draft convention on the use of electronic communications in international contracts

Comments received from Member States and international organizations

Note by the Secretariat

Contents

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II. Compilation of comments

A. States

13. France

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1. The draft convention is designed primarily to remove legal obstacles to electronic commerce that may result from form requirements relating to commercial contracts that were concluded prior to the development of electronic communications. To that end, the draft incorporates the solutions developed by UNCITRAL in the Model Law on Electronic Commerce. The approach adopted consists in recognizing the functional equivalence between electronic and paper documents where guarantees for their storage and integrity are assured. *In that respect the contribution of the Convention will be to extend the application of those solutions to international trade*, particularly by enabling countries that do not have related legislation to apply such solutions to their trade activities. In this regard the draft presents few difficulties.

2. However, it is insufficient to transpose rules designed for application within a national context. International law does not possess the complete and homogeneous set of standards that characterizes national jurisdictions. Furthermore, international electronic commerce presents particular risks for the contracting partners. Lastly, it can serve as a vehicle for phenomena which are of great concern such as commercial fraud in various forms, money-laundering and the financing of terrorism. It is therefore vital to draw up additional provisions in order to promote *confidence in electronic communications*. The provisions that have been adopted relating to place of business—which is a concept vital to the legal security of electronic partners—or those relating to *information requirements* remain partial and lag far behind the useful rules introduced by other legislation.

3. Moreover, the convention as drafted would have a very extensive spatial and material scope of application. The task with which the Working Group was initially entrusted was to explore ways to remove obstacles to the use of electronic communications in all conventions relating to international trade. As no conclusive results were reached in this area, the task now rests with the draft convention. Thus, *ratione materiae*, the convention would apply to international instruments preceding in time. It would likewise apply, *ratione loci*, to international contracts concluded between operators located in different States. These provisions, combined with those relating to party autonomy, would render the convention applicable even to those States that had neither signed nor ratified it. *It is therefore important to limit the scope of application of the convention.*

The removal of legal obstacles to electronic commerce: a useful transposition to the international order of UNCITRAL Model Law rules.

4. With regard to the validity of electronic contracts, article 8 of the draft convention, “Legal recognition of electronic communications”, sets out the

currently accepted[1] principle according to which a contract may not be denied legal validity on the sole ground that it has been concluded electronically.

5. As regards the *form* of an electronic contract, the conclusion of such a contract is not subject to any requirement as to form. The draft reaffirms the principles of consensuality and freedom of form which are standard in the law of obligations and reflected in the United Nations Convention on Contracts for the International Sale of Goods (CISG).[2]

6. However, international trade requires written and often very detailed contracts in the majority of situations. It is therefore appropriate to ensure *equivalence, in terms of reliability*, between messages exchanged in electronic form and paper documents.

7. The provisions envisaged are based largely on the UNCITRAL Model Law, which sets out to recognize the functional equivalence between electronic documents and various types of paper documents. They will therefore greatly facilitate the development of electronic commerce.

8. However, these form requirements would apply only "where the law requires that … a contract should be in writing" (article 9, paragraph 2, of the draft convention), or "where the law requires that … a contract should be signed" (paragraph 3). Given that operators often refer not to a law but to a convention or to accepted practices, this would considerably diminish the scope of the provision. It would therefore be desirable for the following wording to be used: "where the applicable international conventions, international trade rules and practices or the law require […]".[3]

9. As regards the important question of *errors in electronic communications*—such transactions presenting particular risks—the Working Group has drawn up provisions which have the disadvantage of giving parties the possibility of calling into question contracts that have already been concluded.

10. These provisions would weaken contracts concluded electronically, potentially slowing the development of electronic commerce.

11. Once concluded, it should not be possible for a contract to be denied validity. Purchasers of goods and services should have the opportunity to correct input errors *immediately prior to confirmation of acceptance (double click)*. The establishment of an obligation for service providers—which technically is quite practicable—would make it possible to retain functional equivalence.

12. It should also be recalled that the aim agreed on in the Working Group was to ensure that the ordinary law of obligations—which differs in each State—*was not affected* by the establishment of specific rules for electronic commerce.

Confidence in electronic communications: inadequate legal provision

13. The scope of the draft provisions is uncertain as regards place of business, which is a vital concept in establishing confidence in electronic communications.

14. Certain arguments that operators might have a "virtual domicile", namely their Internet site or electronic mailbox, appear to have influenced the work of the Working Group on Electronic Commerce.[4] However, such concepts present great

risks in that they would make it difficult to identify the domicile of an international operator. Such an operator could establish an artificial location for its "virtual domicile", leaving the contracting partner in ignorance as to the country of establishment of the website or server and potentially requiring that partner to institute a procedure in a country, in a language or in accordance with rules previously unforeseen.

15. The draft convention may therefore create inopportune procedural obstacles. It could create favourable conditions for commercial fraud, the rapid development of which has rightly caused concern among UNCITRAL member States. In that connection it should be recalled that, during the last session of the Commission, Member States were urged to *ensure that those concerns were taken into account in the activities of the Working Groups*.

16. UNCITRAL must consider not only strictly trade-related matters but also the need to *combat money-laundering and the financing of terrorism*, which are currently the object of international negotiations. In that regard it is appropriate to refer to the recommendations of the Financial Action Task Force (FATF) relating to the financing of terrorism. In this light, it may seem obvious that operators should be required to declare their *place of business*.

17. In this field, it would be wise to adhere to some basic rules from which the convention as currently drafted appears to be diverging. Thus the text creates a presumption that *a party's place of business is the location indicated by that party* (draft article 4).

18. The draft is also minimalist where it limits itself to referring to national law with regard to *information requirements* to which contractual parties are subject (draft article 7). Moreover, the potential impact of this provision is rendered uncertain by the provision that the draft convention makes elsewhere for contractual freedom (article 3, "Party autonomy").

19. *Given also the extensive scope of spatial application envisaged, parties could use these provisions to avoid the obligations imposed on them by national law. It is the view of the French delegation that the Convention should contain five core elements:*

(a) The location of the parties should be their place of business. This basic requirement should be incorporated in article 6.

(b) The place of business should be set out in a declaration, or information thereon should be mandatory. Draft article 6 envisages an optional declaration, combined with the major disadvantage that a presumption is created—favouring the declaring party—that a party's place of business is the location indicated by that party. Paradoxically, this would have the effect of immediately protecting the vendor rather than the other contracting partner. The declaration should therefore be required to indicate place of business, identity and registration number in the trade register. It is necessary, if their effect is not to be nullified, to remove these minimal obligations, as well as those relating to place of business, from the ambit of the provisions from which the parties may derogate by exercising their contractual freedom (draft article 3).

(c) It is helpful to state—as the draft rightly does—that the technological facility with the help of which electronic commerce is effected does not constitute place of business.

(d) Finally, clear rules should be established that make it possible to determine the location of the parties in order to avoid legal uncertainty, particularly in the case of disputes. The failure of the United Nations Convention on Contracts for the International Sale of Goods to be specific in that regard has generated substantial disagreement. The generally accepted concept of "place of business" should be used. However, there appears to be no need to include a specific definition in the text: this approach has the disadvantage of giving rise to a different interpretation of the same concept in each international convention, leading to an undesirable fragmentation of the law. The concept of "place of business" is characterized by a combination of features: it is a facility having premises; the installations have a certain degree of permanence, depending on the activity in question; part of or all trade activity is carried out at the place of business. The degree of permanence of the facility may vary according to the activity concerned. It is likewise helpful to highlight, as the draft rightly does, that if a party has more than one place of business the place of business to be considered is that which has the closest relationship to the relevant contract.

Scope of application of the convention: too extensive

20. *With regard to the spatial scope of application*, the draft convention applies to contracts "*between parties whose places of business are in different States*" (draft article 1). Unlike with other international instruments, there would thus be no requirement that the parties should be located in a State that is party to the convention. This provision would result in rendering the convention applicable even to States that are not party to the convention, having neither negotiated nor adopted it. For the text to be universally applicable would require no more than ratification by a small number of countries, depending on what conditions were adopted for the entry into force of the convention.

21. This provision clearly exceeds the scope usually considered normal for international rules. For example, the United Nations Convention on Contracts for the International Sale of Goods, the uniform law instrument most similar to the draft convention in terms of subject area covered, applies in cases where the parties are located in contracting States or if the rules of private international law lead to the application of the law of a contracting State.

22. All UNCITRAL conventions require that at least one of the parties should belong to a contracting State. This is true not only of CISG but also of the Convention on the Limitation Period in the International Sale of Goods,[5] the Convention on Independent Guarantees and Stand-by Letters of Credit[6] and the Convention on the Assignment of Receivables in International Trade,[7] as well as the Convention on the Liability of Operators of Transport Terminals in International Trade, which has not entered into force.

The scope of spatial application should therefore be limited.

23. With regard to the scope of application *ratione materiae*, the draft contains additional provisions providing for States parties to make a declaration in which they undertake to apply the new convention to international trade-related instruments that preceded it.

24. Of the six instruments considered to merit this general treatment, two have not yet entered into force,[8] and a third,[9] which is in force, has been signed by only a small number of States. The Convention on the Limitation Period in the International Sale of Goods relates to a subject area that is not covered by CISG. In practice, therefore, only CISG and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention) would be affected. *From the point of view of promoting the future convention at the international level*, it might be better simply to include in the preamble of the text a reference to CISG, a uniform law instrument that is widely recognized and applied around the world.

25. Lastly, the complex system of reservations set out in article 18 and of variable scope of application in article 19 is questionable in that it will create variable modalities of implementation for the different States adopting the convention. Such a regime would be a source of legal uncertainty.

26. The main *amendments* proposed by France are as follows (see italics):

Preamble

27. *Desiring to remove legal obstacles to the use of electronic communications in international contracts, particularly those which are subject to the Convention on Contracts for the International Sale of Goods.*

28. The preamble could be shortened considerably. It could simply indicate the two objectives envisaged, namely encouragement of the use of electronic communications in international trade and creation of the conditions required to establish confidence in electronic communications.

Article 1. Scope of application—paragraph 1

"This Convention applies […] in different Contracting States."

Article 3. Party autonomy

"The parties may exclude […], *with the exception of those provisions relating to location of the parties, information requirements, legal recognition of electronic communications and form requirements*."

Article 6. Location of the parties

1. *The location of the parties shall be their place of business.*

2. *The parties shall inform one another other of their respective places of business.*

3. Paragraph 2 becomes paragraph 3. Deletion of the words “has not indicated a place of business and”. Renumbering of paragraphs 3, 4 and 5, which remain unchanged.

Article 7. Information requirements

The parties shall disclose their identity, place of business and registration number in the trade register.

Article 9. Form requirements

Replacement of the words “the law” with the words “*the applicable international conventions, international trade practices or the law*” (paragraphs 2, 3 and 4).

Article 14. Error in electronic communications

Each party shall have the opportunity to correct input errors prior to confirmation of acceptance.

Notes

[1] Cf. Uniform Electronic Transactions Act of the United States of America; Uniform Electronic Commerce Act of Canada; European Directive 2000/31/EC; articles 1108-1, 1316-1 et seq. of the Civil Code of France.

[2] Article 11 of the United Nations Convention on Contracts for the International Sale of Goods: “A contract of sale need not be concluded in or evidenced in writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.”

[3] Or “as required by the relevant rules of law”.

[4] During the previous session of the Working Group, the Group reversed its original approach and decided not to include in the draft a provision relating to “virtual companies”. It would be appropriate to draw all the conclusions from this change in approach in reviewing those provisions relating to place of business.

[5] “This Convention shall apply only (a) if, at the time of the conclusion of the contract, the places of business of the parties to a contract of international sale of goods are in Contracting States; or (b) if the rules of private international law make the law of a Contracting State applicable to the contract of sale.”

[6] “This Convention applies to an international undertaking […] if the place of business of the guarantor/issuer at which the undertaking is issued is in a Contracting State.”

[7] “This Convention applies to (a) assignments of international receivables […] if, at the time of conclusion of the contract of assignment, the assignor is located in a Contracting State.”

[8] Convention on the Liability of Operators of Transport Terminals in International Trade and Convention on the Assignment of Receivables in International Trade.

[9] Convention on Independent Guarantees and Stand-by Letters of Credit.