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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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II. Compilation of comments

A. States

3. China

[Original: Chinese]
[14 April 2005]

Comments of the Chinese Government on the Draft Convention on the Use of Electronic Communications in International Contracts

The Chinese Government,

Noting that the United Nations Commission on International Trade Law (hereinafter referred to as "the Commission"), established in 1966, was given the mandate by the General Assembly to promote the progressive harmonization and unification of international trade law,

Appreciating the efforts that the Commission has made over the years in removing obstacles to electronic commerce in existing laws, notably by enacting the Model Law on Electronic Commerce in 1996 and the Model Law on Electronic Signatures in 2001,

Noting that, starting from 2002, the Working Group on Electronic Commerce (hereinafter referred to as "the Working Group"), at its thirty-ninth, fortieth, forty-first, forty-second, forty-third and forty-fourth sessions, conducted extensive and in-depth discussion of a draft convention concerning electronic contracting, examined and adopted articles 1-14, 18 and 19, and carried out preliminary exchanges of views on other articles,

Considering that a convention governing certain legal aspects of electronic commerce, such as electronic communication, will contribute to increasing legal certainty of international contracts, thus promoting the growth of international trade to the benefit of peoples of all nations,

Hereby offers the following views and suggestions with respect to the draft Convention on the Use of Electronic Communications in International Contracts (hereinafter referred to as "the draft Convention") (A/CN.9/577):

I. We believe that the draft Convention, on the whole, is rather mature and merits our endorsement, on the ground that the draft Convention

- Governs only the electronic communication between parties whose places of business are in different States, thus avoiding, to the extent possible, interference in the domestic laws of a State Party (art. 1);
- Recognizes in an explicit way the principle of party autonomy in private law (art. 3);
- Takes into full account the nature of private law to which the instrument of the Commission belongs, thus avoiding provisions of regulatory nature (arts. 7 and 13);

- Governs only the special question regarding the use of electronic communication in the formation and performance of a contract, without touching upon such substantive issues in the contract law as validity of a contract and the rights and obligations of parties to a contract, thus avoiding, to a large extent, the risk of creating a dual system in the contract law;
- Is generally consistent with the United Nations Convention on Contracts for the International Sale of Goods (arts. 2 (1)(a) and 5), and follows the relevant provisions in the Model Law on Electronic Commerce and the Model Law on Electronic Signature of the Commission, in particular the principles of functional equivalence and technological neutrality (arts. 8 and 9), with even better provisions in some aspects (art. 10).

II. After careful study and extensive consultations with the Chinese experts, we would like to make the following suggestions on some articles of the draft Convention:

1. Preamble

As the Working Group has not made full and thorough discussions on the preamble of the draft Convention so far, we suggest that the Commission at its forthcoming session examine and approve the preamble on a sentence-by-sentence basis.

It should be especially noted that, judging by the provisions on the scope of application in its articles 1 and 19, the draft Convention has a wide scope of application, because, while applying automatically to the use of electronic communication in connection with an international contract not governed by any existing international convention, the draft convention also applies, in accordance with article 19, to the use of electronic communication in connection with a contract governed by other international conventions; however, **references to "trade" or "international trade" that repeatedly appear in the preamble will easily give an impression that this Convention is applicable only to contracts of international trade or contracts related with such trade. Therefore, the Commission might consider whether it is necessary to revise those terms.**

2. Article 1 on scope of application

(i) The Working Group is right to recognize that the use of electronic communication is not limited to the formulation of a contract; it also applies when it comes to the exercise of various rights arising from a contract (for example, notification with respect to cargo receipt, compensation and termination of a contract) and even the performance of a contract.[1] It was pointed out at the Working Group that the term "formulation" in paragraph 1 was used in its broad sense, covering the entire contracting stage from negotiation to invitation to make offers.[2] **We would like to bring to the attention of the Commission two questions: whether the phrase "in connection with the formation or performance of a contract" in paragraph 1 appropriately reflects the intention of the Working**

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[1] See the report of the Working Group on the work of its thirty-ninth session (A/CN.9/509), para. 35.

[2] See the report of the Working Group on the work of its forty-fourth session (A/CN.9/571), para. 15.

Group, and whether that phrase covers, for example, cases involving "notice of cargo receipt", "notice of claim compensation" and "notice of contract termination". In addition, it is also likely that electronic communication is used where there is contract modification and transfer. Given the importance of the scope of application to the Convention, we suggest that the Commission clarify, in an appropriate way (for example, by adding notes or comments to the draft Convention), whether the above-cited phrase covers all those cases.

(ii) As for the proposal of the Secretariat of the Commission to add the words "or agreement" after the word "contract" in paragraph 1, we consider that the formulation of paragraph 1 should be left as it is now, for, in some countries, the term "agreement" is a broad concept with extended meanings, sometimes even beyond the field of law. In this context, the Commission might explain, in a note or comment to the draft Convention, the meaning of the term "contract" as used in the draft Convention.

3. Article 6 on location of the parties

Although the Working Group considered the text of this article at its thirty-ninth, forty-first and forty-fourth sessions, we have noted that so far no discussion had been conducted with regard to its title (Location of the Parties).

Given that this article is intended to establish certain rules whereby the parties can identify each other's **place of business** in order to determine the international or domestic nature of a transaction as well as the place of dispatch and receipt of electronic communications, **the Commission might consider changing the title to "Place of Business of the Parties".**

4. Article 9 on form requirements

As far as we know, there were two variants for paragraph 3. One is based on the UNCITRAL Model Law on Electronic Commerce, the other on the UNCITRAL Model Law on Electronic Signatures. After discussion, the Working Group eventually adopted the former.[3]

We are of the view that, **compared with article 7 of the Model Law on Electronic Commerce, article 6 of the Model Law on Electronic Signatures can significantly increase legal certainty by having set out well-detailed standards for determining the reliability of an electronic signature. Also, in recent years, the Model Law on Electronic Signatures has already had important impacts on quite a number of countries making legislation on electronic commerce. Therefore, we suggest that article 6 of the Model Law on Electronic Signatures be used as the basis for reformulating paragraph 3.**

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[3] See the report of the Working Group on the work of its thirty-ninth session (A/CN.9/509), paras. 118-121 and the report of the Working Group on the work of its forty-second session (A/CN.9/546), paras. 54-57.

5. Article 11 on invitations to make offers

We recall that the Working Group provided clarification regarding the meanings of "interactive applications".[4] **We suggest that the Commission clarify its meanings in an appropriate way (for example, by adding notes or comments to the draft Convention).**

6. Article 14 on error in electronic communications

The current text triggered strong opposition.[5] We would like to bring to the attention of the Commission that the current text, which has gone through many changes, may still have the following problems that were already pointed out:[6]

i. Providing rules on such complex issues as those involving mistakes and errors may interfere with the established principles in the contract law;

ii. This draft article is a provision more suitable to the needs of consumer protection than to the actual needs of commercial transactions;

iii. A provision allowing withdrawal of communication on the ground of input errors will create serious difficulties for the court that is being seized.

We also recall that, in the two variants that were considered by the Working Group at its forty-third session, the consequence for errors in electronic communications is stated as "a contract … has no legal effect and is not enforceable".[7] In this connection, it was suggested at that session that those consequences should be concerned only with avoiding the effects of errors contained in the data message and should not automatically affect the validity of the contract.[8] In the amended text submitted by the Secretariat to the Working Group at its forty-fourth session, it is provided that "… has the right to withdraw the electronic communication in which the input error was made".[9] At its forty-fourth session, the Working Group discussed the question of whether the word "withdraw" should be changed to "correct" or whether it should be amended to "withdraw in whole or in part", and eventually it came to the decision to keep the word "withdraw".

We would like to bring the following fact to the attention of the Commission that, in the United Nations Convention on Contracts for the International Sale of Goods (articles 15 and 16) as well as in the domestic laws of quite a number of countries, difference is made between the words "withdraw" and "revoke". In the case of offer, the word "withdraw" is to mean cancellation of an offer before it reaches an offeree so as not to give it any legal effect from the very beginning, whereas the word "revoke" is to mean cancellation of an offer after it has reached an offeree but before the formulation of a contract, so as to avoid,

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[4] See the report of the Working Group on the work of its forty-second session (A/CN.9/546), para. 114.

[5] See the report of the Working Group on the work of its forty-third session (A/CN.9/548), paras. 15 and 16 and the report of the Working Group on the work of its forty-fourth session (A/CN.9/571), para. 185.

[6] See the report of the Working Group on the work of its forty-fourth session (A/CN.9/571), para. 185.

[7] See the report of the Working Group on the work of its forty-third session (A/CN.9/548), para. 14.

[8] See the report of the Working Group on the work of its forty-third session (A/CN.9/548), para. 19.

[9] See the report of the Working Group on the work of its forty-fourth session (A/CN.9/571), para. 182.

retroactively, the offer that has already come into effect**. The Commission might consider it necessary to change "withdraw" to "revoke", in article 14, paragraph 1, of the draft Convention.**