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Draft Convention on the Use of Electronic Communications in International Contracts

Compilation of comments by Governments and international organizations

Addendum

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II. Compilation of comments

A. States

1. Latvia

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1. Some provisions of the draft convention could prove difficult to reconcile provisions of Directive 2000/31/EC:

- Article 14 of the draft convention and article 11 of the directive risk creating inconsistencies between Community provisions and the Convention. The obligation to provide for means of correcting input errors when they are made is probably more consistent with the aim of giving electronic contracts greater certainty. An ex post facto correction clause could undermine the stability of contracts. In this context it is worth pointing out that the 1980 Rome Convention on the law applicable to contractual obligations seeks to multiply the possibilities for validating the formation of a contract in order to avoid delaying tactics by parties fraudulently challenging the validity of a contract in order to evade its substantive obligations.
- Article 5 of the directive makes it compulsory to provide certain information, a requirement that is enhanced vis-à-vis the regulated professions. According to the EU law, article 7 of the convention would appear to be a simple disconnection clause. It would enable the Directive's provisions to apply to intra Community trade. Extra Community parties would not be obliged to provide any information vis-à-vis their Community co-contractors.
- The definition of establishment is different and the place of location of the parties is based on the presumption of the validity of the place indicated by one party. As regards the concept of established service provider, the directive sets out that case law of the European Court of Justice must be taken into account. Other terms such as "place of business" or "non-transitory establishment" also could create problems under EU law.
- The principle of party autonomy is formulated in a way that would allow derogation from any provision of the Convention.
- The exclusion of certain contracts does not cover the list in the Directive and will depend on the reservations entered by each State.

2. The considerable State-by-State variation in the Convention's scope of application, allowed by the system of declarations and reservations could undermine legal certainty for electronic contracts. The variability of the draft convention's scope of application could entail legal uncertainty for the sector.

2. Mauritius

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[5 April 2005]

(a) Under article 4, in the definition of the words “information system”, it is suggested that the word “displaying” be added after the word “storing”, the more so article 9 (4)(b) provides that information must be capable of being displayed;

(b) Under article 4, in the definition of the words “Automated message system”, the use of the words “or performances” makes the definition unclear. It is not clear as to what “performances” are being referred to;

(c) Under article 6 (2), the reference to paragraph (1) is not necessary as it refers to the **indication** by the party of his place of business, whereas paragraph (2) deals with the case where no place of business has been indicated;

(d) Under article 8 (1), it must be made clear that a communication or a contract in the form of an electronic communication **shall not be denied legal effect**. It is therefore suggested that the words “legal effect” be added immediately after the words “shall not be denied”:

(e) (i) Under article 10 (1), the Commission may consider using the word “sending” instead of the word “dispatch”;

(ii) Furthermore, notwithstanding the general principles as contained in paragraph (1), the parties may agree between themselves when, for the purposes of them concluding an agreement electronically, is the time and place of the sending and receipt of the electronic communication. It is therefore suggested that the words “Unless otherwise agreed between the originator and the addressee,” be added in paragraph (1) immediately before the words “The time of ...”.

(f) Under paragraph 12, it is suggested that the words “legal effect” be added immediately after the words “shall not be denied”.