United Nations A/CN.9/WG.IV/WP.98/Add.5

General Assembly

Distr.: Limited
24 February 2003

Original: English

United Nations Commission on International Trade Law
Working Group on Electronic Commerce
Forty-first session
New York, 5-9 May 2003

Legal barriers to the development of electronic commerce in international instruments relating to international trade

Compilation of comments by Governments and international organizations

Addendum

Contents

Page

I. Compilation of comments 2
B. Intergovernmental organizations 2
Permanent Bureau of the Hague Conference on Private International Law 2

V.03-81347 (E)

I. Compilation of comments

B. Intergovernmental organizations

Permanent Bureau of the Hague Conference on Private International Law

[9 October 2002]

1. At the request of the Working Group on Electronic Commerce of the United Nations Commission on International Trade Law (UNCITRAL), the UNCITRAL secretariat has invited the Hague Conference and other intergovernmental organizations to identify any "trade-related instruments" developed under their auspices that might pose a possible legal barrier to the use of electronic commerce. Organizations were asked to provide the title and source of any instrument that was considered to be of relevance to the UNCITRAL project.

2. The Permanent Bureau of the Hague Conference on Private International Law welcomes the efforts undertaken by UNCITRAL and congratulates the secretariat on its extremely valuable study contained in document A/CN.9/WG.IV/WP.94. As to the invitation extended by the UNCITRAL secretariat to intergovernmental organizations to indicate any convention hosted by them that they would like to see included in the survey carried out by UNCITRAL, the Hague Conference finds itself in a similar position to that stated by the World Intellectual Property Organization in document A/CN.9/WG.IV/WP.98. With regard to the Hague Conventions, the work contemplated in the letter from UNCITRAL is to a large extent already under way within the framework of the Hague Conference. A review of the Hague Conventions is currently being carried out by the Permanent Bureau in the context of its general mandate to examine private international law rules in the context of the information society.[1] While that work therefore should not be duplicated within the framework of UNCITRAL, the Permanent Bureau of the Hague Conference is happy to share the information below concerning the work carried out by it in that respect with UNCITRAL and its member States.

3. In order to facilitate the work of the UNCITRAL secretariat, the Permanent Bureau hereby submits a first report describing the Hague Conventions on administrative and judicial cooperation that have an impact on electronic commerce (e-commerce) and trade, specifically, the Hague Convention of 1 March 1954 Relating to Civil Procedure, the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalization for Foreign Public Documents, the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters and the Hague Convention of 25 October 1980 on International Access to Justice. In structure, the report annexed to the present document follows the summary format used by UNCITRAL in its preliminary survey of such instruments (A/CN.9/WG.IV/WP.94).

4. Two preliminary remarks are in order:

(a) The five Hague Conventions analysed below may well, after a final review of their operation in a digitized environment, appear to be able to function without any need for a formal revision. Although they are without any doubt of

relevance for e-commerce, caution is therefore needed when discussing them under the heading of "possible legal barriers" to e-commerce as suggested in the UNCITRAL documents;

(b) With regard to the Convention Abolishing the Requirement of Legislation for Foreign Public Documents as well as the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the "Service Convention") and the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, the work carried out by the Hague Conference in examining the "fitness" of those conventions in a digital environment will be continued in the framework of a special commission to which all the 62 member States of the Hague Conference as well as non-member States who are parties to those conventions will be invited, to take place probably in March 2003. Therefore, it is at present too early for the Permanent Bureau to draw final conclusions in this respect. Moreover, the Permanent Bureau reserves the possibility to submit a further report on any other Hague Conventions that, during the continuing research, might appear of relevance to the work undertaken by UNCITRAL.

General comments

5. In analysing digitization of the five Hague Conventions, the annexed report relies upon several presuppositions concerning digital communications in general and e-commerce in particular.

6. To begin with, the report recognizes that there seems to be at least some international consensus on the preconditions for e-commerce, but little consensus on the means to achieve those goals. Specifically, consensus seems to emerge that any e-commerce standards must satisfy at least two[2] minimum requirements:

(a) *Authentication* (some means to verify that data is what it purports to be); and

(b) *Security* (a means to protect data from corruption during transmission and to ensure that only authorized parties have access to it).

7. Likewise, it is widely understood that e-commerce has both legal and technological components that will require international cooperation by public and private players. However, standards are only beginning to emerge in each of those dimensions and so the report does not specify any particular means (legal or technological) whereby the Hague Conventions could achieve either authentication or security.

8. On principle, the five e-commerce-related Hague Conventions listed above will tend to facilitate trade because each convention harmonizes transnational judicial or administrative procedures by means of standardized forms or procedures. Such harmonization thereby increases the legal certainty and access to judicial proceedings that are so crucial to international trade. Nevertheless, the conventions were drafted prior to the existence of the Internet and their reliance on standardized forms or procedures presumes a physical legal universe. In the pre-electronic legal universe, most legal rights, duties and statuses were authenticated only via a physical document (contracts, wills, judgements, birth certificates and so on). Similarly, most of those physical documents were legally valid only if they contained a signature/certification by the authorized person or organization.

Therefore, electronic versions of documents and signature/certification will be developed for all the conventions' forms and procedures by applying the method of the functional equivalent,[3] as noted in the analysis of each convention below.

9. One underlying element of all five Hague Conventions discussed below that may be beneficial for their application in a digital environment is that many of the forms and procedures mandated by the conventions are intergovernmental or at least "semi-governmental".[4] The forms provided for in the conventions must be completed by public or semi-public bodies or authorities (judicial, diplomatic, consular, notarial or administrative) and then transmitted to other public authorities, without the participation or intervention of any private parties. One might designate such communications "Government-to-Government" or "G2G" (by analogy with "business-to-business" or "B2B" transactions in the commercial universe). A possible effect of G2G control over these documents and procedures may be that it might facilitate implementation of any common standard for a functional equivalent for the electronic environment within States parties to the conventions discussed here and thereby enhance trust. The same actors, that is, the contracting States and bodies supervised by them, would be involved in agreeing on such standards and in subsequently applying them to their own documents and procedures.

10. Several important questions relating to e-commerce are explicitly excluded from the report because a political and/or legal consensus has not yet emerged as to how they should be resolved. Specifically, the report does not address the issues of localization, in particular in relation to jurisdiction (the "where" and thus the jurisdiction to adjudicate over an electronic event or a party involved in such an event), the digital divide (the political, economic and geographical inequities created by the fact that e-commerce is not yet fully global), electronic alternative dispute resolution (whether and to what extent dispute resolution should occur electronically) and excluded subject matter (those transactions which, for reasons of public policy or pragmatics, cannot or should not occur electronically). Although each of these issues will directly impact the five Hague Conventions when applied to e-commerce, the report is merely a preliminary analysis of authentication, documentation and certification for the digitized version of each convention's scope.

11. In sum, the report analyses each of the relevant Hague Conventions in its relationship to the e-commerce goals of authentication and security, but does not specify the means to achieve those goals or resolve ancillary legal issues. A more general discussion of many of the issues dealt with in the report can be found in the document "Electronic data interchange, internet and electronic commerce", which was drawn up by Catherine Kessedjian after the round table on the issues of private international law raised by electronic commerce and the Internet, organized by the Hague Conference in collaboration with the University of Geneva in September 1999.[5]

Notes

[1] See, in this context, in Preliminary Document No. 3 of April 1992, the Note on problems that, in the area of commercial law, arise from the utilization of electronic processes, drawn up by Michel Pelichet (Hague Conference on Private International Law, *Proceedings of the Seventeenth Session, 1995, Tome I*, p. 89).

[2] Some countries have already developed further standards. In Canada, for instance, there are five requirements: authenticity, security, confidentiality, integrity and non-repudiation.

[3] This means that for each of the documents, methods, forms and procedures referred to in the conventions, the aims and function will have to be considered before assessing whether these can also be achieved in an electronic environment.

[4] In the context of the Service Convention, for instance, it has to be recalled that service of process is carried out by public officials in many States, while in others it is done by bailiffs or *huissiers* who may have a semi-public, semi-private status. In a third group of States, again, service lies with the parties themselves. Generally speaking, however, there is a strong predominance of immediate contacts between public authorities that justifies the statement made here.

[5] Preliminary Document No. 7 for the attention of the Special Commission on General Affairs and Policy of the Hague Conference of May 2000, to be found at www.hcch.net/doc/gen_pd7e.doc

Annex

The Hague Conventions

1. Convention relative à la procédure civile [Convention relating to Civil Procedure]

(The Hague, 1 March 1954)

Status: Entered into force on 12 April 1957 (43 parties).

Source: Hague Conference, *Collection of Conventions*, Convention No. 2 (available at www.hcch.net/e/conventions/text02e.html).

Comments

1. The purpose of the Convention is twofold: to promote national treatment in legal procedures for parties who are nationals of, and for authorities of, other contracting States, and to facilitate judicial cooperation between contracting States by creating uniform procedures and forms for service of process, letters rogatory, security for costs, legal aid, issuance of extracts of records and imprisonment for debts. The Convention has been revised in three stages: service, evidence and access to justice (see the discussion of the Conventions in sections 3-5 below).

Service of process (arts. 1-7)

2. Service of process typically involves three elements: (a) the documents to be served; (b) service of those documents by means of a representative of the requested State on the person of the receiving party with exception occasionally made for service by mail or by a diplomatic or consular representative of the requesting State; and (c) the proof of service documents created by that representative. Physicality, at the time of drafting, was (only) implicitly present under the Convention for all three elements, while signatures/certifications are required for proof of service under the Convention.

3. An electronic version of service of process could conceivably be created for any one of the elements in the service of process, or for all three of them. The documents to be served are created by or under the control of (semi-)public authorities; therefore, it should not be difficult to transform the documents into electronic form. By contrast, service addressees are often private parties and so the actual service of the documents may in effect be difficult to perform electronically. Whether this is legally permitted will depend on the national law(s) involved and requires further study. Indeed, based on the functional equivalent approach and extrapolating from the fact that many contracting States refuse to accept service by mail, electronic service may prove legally or practically impossible at least for the near future. Nevertheless, States may be willing to make distinctions between private addressees, commercial addressees, attorneys and public addressees in a graduated acceptance of electronic service (presumably public addressees and attorneys would be the least problematic and private addressees the most so).

Letters rogatory (arts. 8-16)

4. A letter rogatory is the request by one court to a second court to perform a judicial act on behalf of the first court. Under the Convention, three documents are required in order to execute this judicial request: (a) the requesting court must, through diplomatic channels, submit the letter rogatory to the requested authority; (b) the requested authority must, through the same channels, transmit to the requesting State a document certifying that the letter rogatory has been executed (or the reason why it was not executed); and (c) if the letter rogatory is not in the language of the requested State or in a language agreed upon by both States, it must be accompanied by a translation into one of those languages, which itself must be certified by a diplomatic or consular agent of the requesting State or by a sworn translator of the requested State.

5. Again, there is no explicit requirement under the Convention for any of those documents to be tangible. Furthermore, the only signature and/or certification required by the Convention is when the letter rogatory must be accompanied by a translation that itself must be certified by a diplomatic or consular agent of the requesting State or by a sworn translator of the requested State.

6. Letters rogatory and their accompanying translations as well as the certificates of execution are documents created by or under the oversight of, and communicated between, public authorities. Therefore, States parties may be ready to define common standards for the electronic versions of such documents and subsequently apply them in their mutual relations.

Costs of proceedings (arts. 17-19)

7. The Convention mandates that a final decision from one contracting State concerning the costs and expenses of a lawsuit (if imposed according to the principle of national treatment) is enforceable in other contracting States. The requested State must enforce that decision if presented with the following documents: (a) a transcript of the decision satisfying relevant conditions of authenticity established by the national law of its country of origin; (b) an official declaration by the issuing authorities that this decision has achieved the status of res judicata; (c) a certification as to the competence of the issuing authority made by the highest official in charge of the administration of justice in the requesting State; and (d) and (e) translations of both the decision and the competency certification into the language of the requested State or into a language agreed upon by the States concerned, to be accompanied, unless agreed otherwise, by a certification of accuracy.

Legal aid (arts. 20-24)

8. The Convention establishes that indigent nationals of one contracting State are entitled to the same free legal aid in another contracting State as provided by the latter for civil, commercial or administrative matters to its own nationals. Three types of documentation are required under the Convention in order to benefit from this legal aid: (a) nationals of other contracting States must prove their need through a certificate or declaration of need issued by the authorities of (in order of preference) their habitual residence, their present residence or the country to which they belong; (b) if the person concerned does not reside in the country where the

request is made, the certificate or statement of need must be authenticated by a diplomatic or consular agent of the country where the document is to be produced; and (c) the documentary and procedural provisions concerning letters rogatory (i.e. the certifications and translations outlined in paras. 4 and 5 above) are applicable to the transmission of requests for free legal aid and of any documents attached thereto.

9. The Convention does not explicitly specify any format for the required documents.

Free issue of extracts from civil status records (art. 25)

10. This section allows indigent nationals of one contracting State to procure free extracts of civil status records from other contracting States under the same conditions as nationals of those States. The Convention does not specify any physical format or signature/certification when the national requests or the State provides those extracts. As far as the requirements for proof of need as set out in paragraph 8 are read as being implied also in this provision, the same considerations as described above would apply here.

Imprisonment for debt (art. 26)

11. The Convention here forbids a contracting State to imprison nationals of another contracting State for debts (either as a precautionary measure or as a means of enforcement) under different conditions than the imprisoning State would apply to its own nationals. The Convention does not require any documents or signatures/certifications under this provision.

Conclusion

12. See cover note above (in particular paras. 2 and 4).

2. Convention Abolishing the Requirement of Legalization for Foreign Public Documents

(The Hague, 5 October 1961)

Status: Entered into force on 24 January 1965 (77 parties).

Source: Hague Conference, *Collection of Conventions*, Convention No. 12 (available at www.hcch.net/e/conventions/text12e.html).

Comments

13. The purpose of this Convention is to abolish the requirement of diplomatic or consular legalization for foreign public documents, specifying instead that authorities in contracting States may issue a certificate ("*apostille*") that will accompany the document and certify the identity and capacity of the document's signatory for the purpose of evidence in all other contracting States.

14. The Convention specifies the size, format and required elements for the *apostille*, a sample of which is annexed to the Convention. Although the *apostille* certifies the identity and capacity of the document's signatory, the *apostille* itself is

explicitly exempted from any certification requirement. Finally, the Convention specifies that each contracting State must maintain a register of issued *apostilles*.

15. The *apostille* could easily be given an electronic format (possibly designed under the direction of the Hague Conference), as could the public register of issued *apostilles*.[a] A more difficult problem, however, arises from the fact that the *apostille* must travel together with the public document that it certifies; therefore, an electronic *apostille* will only be effective if the public document that it accompanies is likewise in electronic format. Given that the *apostille* must emanate from the authorities of the same contracting State that issued the original public document but not necessarily from the same authority within that State, it will have to be further discussed whether, for instance, the authority issuing the *apostille* should be entitled to convert the document emanating from another authority within that same State into an electronic form or whether other solutions would have to be found.[b] Member States of the Hague Conference on Private International Law and other States parties to this Convention will address these issues during a special commission on the operation of this Convention as well as the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the "Service Convention") and the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (the "Evidence Convention"), to be held in March 2003.

Conclusion

16. See cover note above (in particular paras. 2 and 4).

3. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters

(The Hague, 15 November 1965)

Status: Entered into force on 10 February 1969 (48 parties).

Source: Hague Conference, *Collection of Conventions*, Convention No. 14 (available at www.hcch.net/e/conventions/text14e.html).

Comments

17. The purpose of this Convention is to create uniform procedures for service abroad of judicial and extrajudicial documents, by establishing standardized service documents and a nationally designated central authority for each contracting State through which these documents are to be transmitted to another contracting State for service there. This Convention replaces the provisions of articles 1-7 of the 1954 Convention on Civil Procedure for the States that are party to both Conventions.

18. This Convention differs from the service provisions under the 1954 Civil Procedure Convention (see paras. 2 and 3 above on that Convention) in its standardized service documents and its requirement that each contracting State designate a central authority. The Convention mandates uniform service documents—the request for service from the originating authority and the certificate of service once service has been completed by the requested authority—which are

annexed at the end of the Convention. Service as such has to be effected according to the internal law of the requested State or by a method specifically requested by the applicant. The Convention makes a mandatory exception for nationals of the requesting State, who may be served directly through the diplomatic or consular agents of that State, and for addressees who accept service voluntarily; in all other cases, service abroad must be performed according to the procedures and forms established by the Convention.

19. In accommodating this Convention to the electronic universe, the analysis is the same as for the Service portion of the 1954 Civil Procedure Convention (see paras. 2 and 3 above on that Convention). Again, one could assume that States parties may be ready to define common standards for the electronic versions of such documents and subsequently apply them in their mutual relations, given that they are all created by or under the control of (semi-)public authorities. By contrast, the actual service of these documents on the addressee will be more difficult to perform electronically because many service addressees are private parties. Nevertheless, States may be willing to introduce a graduated electronic service, accepting it first for governmental addressees and/or attorneys and then for commercial addressees, but they may not accept electronic service for private addressees in the near future.[c]

Conclusion

20. See cover note above (in particular paras. 2 and 4).

4. Convention on the Taking of Evidence Abroad in Civil or Commercial Matters

(The Hague, 18 March 1970)

Status: Entered into force on 7 October 1972 (1 signatory, 38 parties).

Source: Hague Conference, *Collection of Conventions*, Convention No. 20 (available at www.hcch.net/e/conventions/text20e.html).

Comments

21. The purpose of the Convention is to facilitate the transmission and execution abroad of requests for evidence in civil or commercial matters through the creation of national central authorities and a standardized procedure. This Convention replaces the provisions of articles 8-16 of the 1954 Convention on Civil Procedure for the States that are party to both Conventions.

22. The Convention does not specify any particular form for the letter of request (and indeed it explicitly prohibits contracting States from requiring that such request be subject to legalization) or for the documents certifying that the request was executed. However, recommended forms have been developed for letters of request, which can be found in the Practical Handbook on the operation of the Evidence Convention.[d] Moreover, if the letter of request must be translated into an official language of the requested State, then that translation must be certified by a diplomatic officer, consular agent, sworn translator or other authorized person of either State.

23. The letter of request, as well as the certification that the request was executed and any necessary translations are all created by or under the control of public authorities. Therefore, States parties may be ready to define common standards for the electronic versions of each document and subsequently apply them in their mutual relations.[e]

Conclusion

24. See cover note above (in particular paras. 2 and 4).

5. Convention on International Access to Justice

(The Hague, 25 October 1980)

Status: Entered into force on 1 May 1988 (6 signatories, 18 parties).

Source: Hague Conference, *Collection of Conventions*, Convention No. 29 (available at www.hcch.net/e/conventions/text29e.html).

Comments

Legal aid (arts. 1-13)

25. The purpose of this Convention is to facilitate access to legal aid for eligible nationals of one contracting State for civil and commercial court proceedings in another contracting State and on the same conditions as that second State provides legal aid to its own nationals habitually resident there. Transmission of applications is effected according to a standardized procedure between transmitting and central authorities. This Convention provides similar benefits by means of similar procedures as those stipulated under the 1954 Civil Procedure Convention (see above) and adds an increased standardization; indeed, this Convention replaces the legal aid provisions of the 1954 Convention for those States that are party to both Conventions.

26. The Convention mandates that applications for legal aid falling within the scope of the Convention must be made according to the model form annexed to it; any supporting documentation required by the application is exempted from legalization. If the application (or any supporting documentation) must be translated into an official language of the requested State, the translation does not need to be certified.

Security for costs and enforceability of orders for costs (arts. 14-17)

27. No contracting State may require any security, bond or deposit for costs from a plaintiff who is a foreign national habitually resident in another contracting State only on the basis of that (natural or legal) person's foreign nationality. Where an order for payment of costs and expenses of proceedings is made against such person, it is to be declared enforceable in other contracting States upon application by the person entitled to the benefit of the order. That application must include four documents: (a) a true copy of the relevant part of the decision; (b) any document necessary to prove that the decision is final and enforceable in the country of origin;

and (c) and (d) certified translations of both the decision and the document proving finality.

28. All documents required by the Convention for enforcing cost orders are public documents circulated among public authorities. Therefore, States parties may be ready to define common standards for the electronic versions of each document and subsequently apply them in their mutual relations.

Conclusion

29. See cover note above (in particular paras. 2 and 4).

30. For any questions and comments please contact:

Andrea Schulz, LL.M.
First Secretary
Hague Conference on Private International Law
6, Scheveningseweg
2517 KT The Hague
Netherlands
Telephone: + (31) (70) 363 3303
Facsimile: + (31) (70) 360 4867
Electronic mail: secretariat@hcch.nl
Internet: www.hcch.net

Notes

a To some extent, electronic land title registers or electronic personal property registers, which do already exist in some States, could serve as examples to develop an electronic *apostille* register.

b A first study of these questions was conducted by the Permanent Bureau of the Hague Conference on Private International Law as early as 1990. The preliminary conclusions drawn at that time can be found in the Note on certain questions concerning the operation of the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalization for Foreign Public Documents, drawn up by the Permanent Bureau (Hague Conference on Private International Law, *Proceedings of the Seventeenth Session, 1995, Tome I*, p. 219). Following discussion at the Seventeenth Diplomatic Session, member States decided to include in the agenda of the Conference the international legal problems raised by electronic data interchange (ibid., p. 43). See further the discussion of these issues at the Geneva Round Table in 1999, reported in Preliminary Document No. 7 (see above, note 5) at p. 31 ff.

c See also the extensive discussion of these issues at the Geneva Round Table in 1999, reported in Preliminary Document No. 7 (see above, note 5) at pp. 25-30.

d Practical Handbook on the Operation of the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (loose-leaf edition), 1984. A new version is currently being prepared by the Permanent Bureau.

e See further the discussion of these issues at the Geneva Round Table in 1999, reported in Preliminary Document No. 7 (see above, note 5) at pp. 30 ff.