

UN Releases New International Convention on Electronic Contracting

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1. Background

The United Nations Commission on International Trade Law (UNCITRAL) Draft Convention on the use of electronic communications in international contracts (referred to in this article as the Draft Convention on electronic contracting) is one of the most significant recent developments in international electronic commerce law. UNCITRAL has now finalised the text of the convention and expects to discuss approval of the Draft Convention at a full Commission meeting in mid 2005. The Draft Convention could then be presented to the UN General Assembly and may be open for ratification by the end of 2005 or early 2006.

1.1. Preparation of the Draft Convention

The current work of the UNCITRAL Electronic Commerce Working Group (ECWG) on the Draft Convention on electronic contracting is directed at achieving an UNCITRAL recommendation to:

“[prepare an] international instrument dealing with selected issues on electronic contracting and a comprehensive survey of possible legal barriers to the development of electronic commerce in international instruments.”⁴

¹ Galexia conducts a wide range of strategic projects on e-commerce law in Australia and the region, and a Convention on electronic contracting may be of particular importance in this area. For example, Galexia is currently assisting ASEAN in harmonising e-commerce legal infrastructure. For more information refer to http://consult.galexia.com/public/about/news/about_news-id19.html

² HTML version of paper: http://consult.galexia.com/public/research/articles/research_articles-art31.html.

³ PDF version of paper: http://consult.galexia.com/public/research/assets/galexia_uncitral_draft_convention_v4_20050104.pdf.

⁴ Recommendations made at UNCITRAL's meeting of its thirty-fourth session (25 June - 13 July 2001, Vienna).

The first draft of the convention was presented for review in 2002, and since then review and modification of the Draft Convention has played a leading role in subsequent meetings of the working group. The final text for the Draft Convention was confirmed at the 44th session of the UNCITRAL Electronic Commerce Working Group (11-22 October 2004, Vienna).

The Draft Convention on electronic contracting seeks to harmonise national laws regarding how electronic contracts can be made. Harmonised domestic legislation will assist to overcome the legal uncertainty in international business transactions when contracting parties are from different countries. Apart from creating a uniform legal regime for electronic transactions, the Draft Convention is also intended to be as technologically neutral as possible, covering electronic communications in various forms⁵ exchanged between parties in relation to an existing or contemplated contract. The Draft Convention's focus on electronic communications made between parties means that the text is not restricted to the contract itself or its administration, but can also regulate the events leading up to formation, such as offer and acceptance.

1.2. Relationship with the UNCITRAL Model Laws

The Draft Convention on electronic contracting is the first attempt by UNCITRAL to deal with electronic transactions in a manner that binds Member States (through ratification), however, it is not the Commission's first foray in the regulatory field of certainty in electronic contracts. The UNCITRAL Model Laws on Electronic Commerce (1996)⁶ and Electronic Signatures (2001)⁷ were intended to assist countries in the framing of legislation that would enable and facilitate electronic contracting.

Both the Model Laws adopt a limited framework approach. They are not intended to be a comprehensive code-like articulation of rules for electronic transactions, nor are they intended to govern every aspect of electronic transactions. Rather, the aim is to provide essential procedures and principles for electronic contracting.

The Model Laws are simply regulatory texts that UNCITRAL recommend national legislators incorporate into domestic law. While strongly recommended, model laws, unlike a United Nations (UN) convention, do not require the enacting State to notify the UN or other nations they have enacted it, nor are there any formal methods of adoption. Conventions on the other hand must be ratified in order to be adopted.

The Draft Convention has not been created in a manner that is blind to the existence of the Model Laws and UNCITRAL's other work in the field of international contracting. Rather, it borrows from underlying principles of existing UNCITRAL texts. The Draft Convention embodies the two underlying principles of the 1996 Model Law of functional equivalence (paper documents and electronic transactions are treated equally by the law) and media neutrality (the law does not discriminate between different forms of technology).

The principle of party autonomy that is key to the UN Convention on Contracts for the International Sale of Goods (CISG), and (to a slightly lesser extent) the 1996 and 2001 Model Laws is also adopted in the Draft Convention. Party autonomy or the principle of contractual freedom is important to ensure parties are at liberty to choose who they contract with, and on what terms.

⁵ Such as email and electronic data interchange (EDI), and older forms of communication such as telegram, telex and telecopy.

⁶ Available at: <<http://www.uncitral.org/english/texts/electcom/ml-ecomm.htm>>.

⁷ Available at: <<http://www.uncitral.org/english/texts/electcom/ml-elecsig-e.pdf>>.

2. Key Provisions of the Draft Convention

This section examines the key provisions in the final version of the Draft Convention⁸ and their effect.

2.1. Article 1 – Scope of Application

The Draft Convention adopts an extremely broad scope of application. It will apply to the use of electronic communications related to a contract between parties whose places of business are in different States. The fact that the parties have their places of business in different States is to be disregarded if it is not disclosed or apparent from the contract.

2.2. Article 2 – Exclusions

Article 2 contains a short list of exclusions. The main exclusion is contracts for personal, family or household purposes. A State is also able to specify further exemptions.

2.3. Article 3 – Party Autonomy

In order to allow contractual freedom, parties are allowed to “exclude the application of the Convention or derogate from or vary the effect of any of its provisions”. No limitation has been placed on this principle of party autonomy.

2.4. Article 6 – Location of the Parties

Article 6 sets out rules to establish the location of the parties. This includes a broad presumption that the place of business is the location indicated by that party. The other tests are:

- If no location has been indicated, the location will be the place of business that has ‘the closest relationship to the relevant contract’;
- If a natural person does not have a place of business, the location will be their residential address;
- The location of the equipment and technology supporting an information system used by a party while contracting does not necessarily constitute a place of business; and
- The fact that a person makes use of a domain name or email address connected to a specific country does not create a presumption that its place of business is located in that country.

⁸ The final text of the draft convention is available at: <http://www.uncitral.org/english/workinggroups/wg_ec/index.htm>

2.5. Article 8 – Legal Recognition of Electronic Communications

Article 8 is the core ‘enabling’ provision which allows electronic commerce to succeed, and is the heart of the Draft Convention. Article 8 provides that a communication, or a contract shall not be denied validity or enforceability on the sole ground that it is in the form of an electronic communication. “Communication” is broadly defined to include statements, declarations, demands, notices, offers, and acceptance made in connection with the formation or performance of a contract.

The Draft Convention also does not force parties into accepting electronic communications if they do not have the wish or means to do so. Paragraph 2 provides:

Nothing in this Convention requires a party to use or accept electronic communications, but a party’s agreement to do so may be inferred from the party’s conduct.

This means that if a party sends a message in electronic form, or responds to a message in electronic form their agreement to accept and use electronic communications can be inferred – no express agreement between the parties is necessary.

2.6. Article 9 – Form Requirements

The Draft Convention does not require a communication to be a particular form to be valid. The form requirements regarding writing provides that a contract or a communication that is required to be in writing shall not be denied validity if it is in the form of an electronic communication that can be accessed and used for subsequent reference.

Paragraph 3 of Article 9 deals with meeting the requirement for a signature in electronic communications. The requirement is met if the method used to create the signature:

- Identifies a person’s identity *and* approval of the information contained in the electronic communication; and
- Is reliable as appropriate to the purpose for which the electronic communication was communicated.

2.7. Article 10 – Time and Place of Dispatch and Receipt of Electronic Communications

Article 10 provides the following times for the dispatch and receipt of electronic communications:

- The time of dispatch of an electronic communication is when it leaves an information system under the control of the originator.
- If the message is sent and received in the same information system, then the time of dispatch is when the message was received.

- The time an electronic communication is received is when it is capable of being retrieved by the addressee at an electronic address designated by the addressee. Note: The time of receipt of an electronic communication at another address is when it becomes capable of being retrieved and the addressee becomes aware that the communication has been sent to that address.

The place of dispatch is the place of the originator's business, and place of receipt is the addressee's place of business.

2.8. Article 11 – Invitations to Make Offers

Article 11 provides that proposals to conclude a contract through one or more electronic communications, which are not addressed to one or more specific persons, but are generally accessible to parties using an information system shall be considered an invitation to make an offer, unless the message clearly indicates an intention there will be a binding contract on acceptance. The article is motivated towards consumer protection and aims to protect people from entering into contracts unwittingly through spam or click-through agreements.

2.9. Article 12 – Use of Automated Message Systems for Contract Formation

Article 12 allows contracts to be validly made even if there was only one, or no human participants. It provides that a contract cannot be denied validity on the ground that one (or both) parties interacted during the contact negotiation process using an automated information system, and the agreement or the actions of the automated system were not reviewed by a person.

2.10. Article 14 – Error in Electronic Communications

The Model Law on Electronic Commerce did not deal with the substantive issues that arise from contract formation, and consequently did not deal with the issue of how to treat contracts where there has been an error made by a person when they have been communicating with an automated information system.

Article 14 provides that where a person has made an input error in an electronic communication with an automated information system belonging to another party, and is not given an opportunity to correct that error, that person has the right to withdraw that electronic communication if:

- The person notifies the other party of the error as soon as practicable after discovering the error;
- The person takes reasonable steps, to return the goods or services received (or destroy the goods or services if instructed to do so by the other party), if any, as a result of the error; and
- The person has not used or received any material benefit or value from the goods or services, if received).

3. Conclusion

The belief that electronic commerce needs more definite regulation than the standards currently set by the Model Laws has led UNCITRAL to develop a convention on electronic contracting. The Draft Convention reflects many of the underlying notions of the Model Law on Electronic Commerce, and to a lesser extent some of the principles of international contracting embodied in the Convention on Contracts for the International Sale of Goods.

The Draft Convention incorporates many of the essential principles of the Model Law on Electronic Commerce, including party autonomy and legal recognition of electronic communications. However, some principles have been significantly modified to meet the need for greater certainty required in a convention, especially provisions on the time and place of contract. New principles have also been incorporated in the Draft Convention, including invitations to make offers, use of automated information systems, and errors in electronic communications, reflecting new legal concerns that have arisen since the release of the first Model Law in 1996.

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