Note

TOWARDS UNIFORM ELECTRONIC CONTRACTING LAW

Legal uncertainties create huge business costs. Disharmony between national legal systems poses legal obstacles to international trading activities. This prompted the United Nations Commission on International Trade Law to draft the United Nations Convention on the Use of Electronic Communications in International Contracts. These uniform rules seek to remove legal obstacles, enhance legal certainty and commercial predictability, and lower transactional costs. This article considers the implications of these changes on electronic contracting law.

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I. United Nations Convention on the Use of Electronic Communications in International Contracts

1 Disharmony between different legal systems and the necessity to determine the applicable law create huge costs for businesses. Thus, basic default rules are needed to govern e-commerce across borders and to create greater legal certainty. The United Nations ("UN") Convention on the Use of Electronic Communications in International Contracts ("the Convention")[1] which seeks to achieve this is the work of the United Nations Commission on International Trade Law ("UNCITRAL") Electronic Commerce Working Group ("ECWG").[2] It is regarded as one of the most important recent developments in international e-commerce

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1 Dated 9 December 2005. The Convention was adopted by UNCITRAL at its 38th session on 15 July 2005: Report of the UNCITRAL on the work of its 38th session 4–15 July 2005 (Document A/60/17). It was adopted by the General Assembly on 23 November 2005.

2 Commencing its work in the 39th session (New York, 11–15 March 2002) and completing it at its 44th session (Vienna, 11–22 October 2004) (Document A/CN.9/577).

law dealing with selected issues on e-contracting and is the result of a comprehensive survey of possible legal barriers to the development of e-commerce.[3]

2 The purpose of the uniform law is to offer practical solutions to issues connected with the use of electronic communications in international contracting. As the ECWG[4] explained, the intention is not to establish substantive rules for matters unconnected with e-communications.[5]

3 In this regard, the *Ad Hoc* Expert Group of the International Chamber of Commerce ("ICC Expert Group")[6] has asked the ECWG to carefully consider whether the Convention should apply only to electronic contracts or to commercial contracts in general and to keep in mind the problems in regulating e-contracts separately from all commercial contracts. It has also asked the ECWG to clarify the interaction between the Convention and the UN Convention on the International Sale of Goods ("the Vienna Sales Convention").[7]

4 The Singapore Consultation Paper of 22 June 2005, the *Joint IDA-AGC Review of the Electronic Transactions Act Stage III: Remaining Issues*, proposed the adoption of the Convention and its extension to all contracts. The reason given is that it would be undesirable to have two regimes, one for international contracts and the other for domestic contracts. This is particularly so in the context of e-contracts where the actual location of the parties may not be relevant or known to the parties. Given the aims of UNCITRAL, it appears difficult to align the whole of domestic law to the provisions of the Convention. It would be simpler to confine the scope of uniform law to international contracts, be they electronic contracts or commercial contracts. Appropriate amendments will have to be made to the Convention if it is also to accommodate non-electronic contracts. A uniform law for all international contracts will no doubt provide a useful legal structure and bring increased certainty and confidence in international e-commerce.

3 34th session of the UNCITRAL ECWG (25 June – 13 July 2001 Vienna).
4 In Document A/CN.9/577/Add.1 (Annex to document).
5 Where a strict separation of technologically related and substantive issues is not feasible, the Convention does establish some rules to ensure the effectiveness of e-communications.
6 Report on draft UNCITRAL Convention on Electronic Contracting (5 December 2001).
7 Dated 11 April 1980.

II. Scope of the Convention: Article 1

5 The scope of the Convention is exceedingly wide. It proposes to bring within its ambit "the use of electronic communications in connection with the formation[8] or performance of a contract[9] between parties whose places of business are in different States". This means that the Convention can apply notwithstanding that one or both States are not Contracting States. This is broader than the scope of other international trade-related instruments such as the Vienna Sales Convention. At the business level, such a default provision may be useful in the interests of uniformity but parties may find themselves inadvertently governed by the Convention. If this is not the intention of the parties, they should include a choice of law clause and expressly exclude the Convention. At the State level, such an excessively wide scope of application would be objectionable as impinging upon the sovereignty of those States which have not ratified the Convention. With this in mind, the Convention allows States, which so desire, to limit the scope of application by declaration under Arts 19 and 21.

6 As for the location of the business, the fact that the parties have places of business in different States will be disregarded if it is not disclosed or apparent from the contract or their dealings. Furthermore, the nationality of the parties or the civil or commercial character of the parties or the contract will be irrelevant in determining the application of the Convention.

III. Declarations on the scope of application: Article 19

7 As mentioned above, any State may declare that it will apply the Convention only when (a) the States referred to in Art 1 are Contracting States or (b) the parties have agreed that the Convention applies.[10]

8 This is to be interpreted widely to include all contracting stages including negotiations and invitations to make offers.

9 UNCITRAL has asked the Secretariat to clarify that this includes arbitration agreements as defined under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention 1958).

10 Article 19 of the Convention.

IV. Exclusion of the Convention: Article 2

8 Article 2 of the Convention provides that the Convention will not apply to e-communications relating to:

(a) contracts for personal, family or household purposes;[11]

(b) transactions on a regulated exchange, *eg* foreign exchange transactions, inter-bank payment systems, *etc*, for the reason that these transactions are already governed by well-defined regulatory controls and industry standards and to subject them to the Convention would be disruptive to the operation of those rules; and

(c) negotiable instruments, bills of lading, warehouse receipts and similar documents of title, the reason for the exclusion being that the need to ensure their singularity or originality went beyond simply ensuring the equivalence between paper and electronic form which was the main aim of the Convention.

The ECWG explained that finding a solution for that problem would require a combination of technological, legal and business solutions which had not yet been fully developed and tested.

V. Party autonomy: Article 3

9 Central to the Convention is the concept of freedom of contract or party autonomy. This is vital to the functioning of international trade and reflects one of the underlying concepts of the UNCITRAL Model Law on Electronic Commerce 1996 ("the 1996 Model law").[12] Article 3 allows parties to exclude the application of the Convention as a whole or only to derogate from or vary the effect of any of its provisions. This means that no party should be compelled to use electronic means in the formation of contracts with regard to offers and acceptances. The

11 Also recommended by the ICC Expert Group due to the difficulty of implementing freedom of contract and the fact that many states see consumer rights as a matter of domestic law. UNCITTRAL explained that the exclusion was not intended to cover only consumer contracts but extended to matrimonial property contracts as governed by the Convention on the Law Applicable to Matrimonial Property Regimes (Hague, 1978).

12 Singapore was the first country to enact the Electronic Transactions Act (Cap 88, 1999 Rev Ed) in 1998 in response to the 1996 Model Law.

explanation given is that a party may lack access to electronic communication or the knowledge to use it or is technophobic – often referred to as the "digital divide" – or because of receipt or authentication problems. The Singapore Consultation Paper proposed to include consent requirements on the use of electronic communication and to make them applicable to international as well as domestic contracts for the reasons cited above. The Consultation Paper also considered whether or not to have a general consent provision applicable to the whole legislation or only to specific provisions, and in addition, whether or not consent should also be implicit, *ie*, inferred from conduct (*eg*, by parties agreeing to contract terms at variance with the provisions of the Convention). However, it is generally accepted that a party cannot contract out of otherwise mandatory national laws.

VI. Interpretation: Article 5

10 Article 5, the interpretation provision, is a standard provision in UNCITRAL texts for example, the Vienna Sales Convention. Regard is to be had to the international character of the Convention and to the need to promote uniformity in its application and the observance of good faith in international trade. Questions which are not settled by the Convention are to be settled according to general principles or to the law applicable according to the rules of private international law.

VII. Location of the parties: Article 6

11 Article 6 reflects UNCITRAL's desire for greater certainty in e-contracting in relation to the time and place of contracting and the need for more specific regulation than the current standards set by the 1996 Model Law. The parties' location is important for issues such as applicable law, jurisdiction and enforcement. The Convention establishes a certain number of presumptions and default rules for determining the location of the parties. To start with, it is the location indicated by the parties. If no location is indicated, it will be the place of business that has "the closest relationship to the relevant contract". Inspired by the Vienna Sales Convention, it provides that if a party has more than one place of business (for example, an Internet vendor may have several warehouses from one of which goods could be shipped in fulfilment of the contract order), the party should be able to designate one of these to be the place of business. In the absence of such designation, it will be the place having the closest connection to the contract. If there is no place of business, it will be the residential address of a natural person. Taking into account the nature of modern communication, the Convention provides that the

location of the mail server or Internet service provider of a party does not necessarily constitute a place of business and the fact that a party uses a country-specific domain name (for example, .sg, .my, .uk, .bs, *etc*) or e-mail address (*eg* abc@yahoo.com.sg) does not create a presumption that the place of business is located in that country.[13] This disregards the "virtual domicile" of a party, that is, the electronic mailbox or Internet site and the creation of an artificial location for its "virtual domicile" which could otherwise be taken advantage of to perpetrate commercial fraud.

VIII. Information requirements: Article 7

12 The Convention recognises the existence of disclosure requirements under the substantive law governing the contract and Art 7 reminds the parties of their obligations to comply with such requirements. Nothing in the Convention allows parties to rely on fictitious places of business so as to avoid legal obligations.

IX. Functional equivalence

13 The Convention proposes to lay down criteria for establishing functional equivalence between electronic and paper documents (including "original" paper documents) and between electronic authentication methods and handwritten signatures. This will assure businesses around the world that electronic contracts are as valid and enforceable as traditional paper-based transactions. This will go beyond the 1996 Model Law and countries will be able to ratify the Convention. While seeking to harmonise national laws on e-contracting, the Convention reiterates the underlying principles of the 1996 Model Law: that of functional equivalence between paper documents and electronic transactions and technological neutrality.[14]

13 It does not prevent a court or arbitrator from taking into account the domain name, among other factors, to determine a party's location: Document A/CN.9/571 para 113.

14 Capable of covering e-mail, electronic data interchange ("EDI") and new forms of electronic communications as well as telefax and the obsolete telex and telegram.

X. Legal recognition of electronic communications: Article 8

14 To establish functional equivalence, it is provided that a communication or contract will not be denied validity or enforceability on the sole ground that it is an electronic communication.[15] A party is not required to use e-communication but the party's agreement to do so may be inferred from conduct.[16] However, the Convention does not venture into determining when an offer and an acceptance become effective for purposes of contract formation for the reason that this might be at variance with the applicable law under the rules of private international law.

XI. Form requirements: Article 9

15 The Convention does not require a communication to be in any form,[17] consistent with the view that e-communication should not be restricted to any specific technological method. This reaffirms the principle of consensuality and freedom of form which is also reflected in the Vienna Sales Convention. If writing is required under the general law, an e-communication shall not be denied validity if it is accessible so as to be used for subsequent reference.[18] In this connection, the Singapore Electronic Transactions Act[19] provides for the functional equivalence of an electronic signature with the legal requirement of a signature. The UNCITRAL Model Law on Electronic Signatures[20] and the Convention have a similar provision but impose an additional reliability requirement. Article 9(3) of the Convention states that the requirement for a signature in e-communications is met if the method used to create the signature identifies a person's identity and indicates his intention in respect of the contents of the e-communication and is reliable as appropriate to the purpose for which the e-communication was communicated in the light of the circumstances, including any relevant agreement, or proven in fact to have fulfilled the first requirement by itself or together with further evidence. This is for the purpose of authenticating and associating the content of the e-communication with the person signing it but not necessarily to require his approval as certain e-communications require only that association but not the approval (for example, the notarisation

15 Article 8(1) of the Convention.
16 Article 8(2) of the Convention.
17 Article 9(1) of the Convention.
18 Article 9(2) of the Convention.
19 *Supra* n 12.
20 Adopted by UNCITRAL on 5 July 2001.

of a document by a notary or attestation by a commissioner for oaths or signature by witnesses).[21]

XII. Time and place of dispatch and receipt of electronic communications: Article 10

16 Article 10 takes into account the nature of e-communications. It provides that the time of dispatch is when the message leaves an information system under the control of the originator or a person sending the message on his behalf. If the message has not left the information system under the control of the originator or the person sending it on his behalf, then it is at the time the message was received (for example, if the message is sent and received in the same information system, then the time of dispatch is when the message is received).

17 The time of receipt is when the message is capable of being retrieved by the addressee[22] at an electronic address designated by the addressee. The time of receipt at another address is when it becomes capable of being retrieved and the addressee becomes aware that the message has been sent to that address.

18 The message is presumed to be capable of being retrieved when it reaches the addressee's electronic address. This applies notwithstanding that the server may be located in a different location from that where the e-message is deemed to be received. This is because the Convention regards the place of business as the place where communication has been dispatched or received and therefore the location of the information system is not significant. This is intended to create certainty, as information systems are accessible from anywhere in the world, and hence to avoid jurisdictional and conflict of laws issues.

21 See Singapore's Comments on the Draft Convention (Document A/CN.9/578/Add.10). Singapore also proposed that the "reliability requirement" be deleted as it creates significant uncertainty which does not promote the use of e-commerce. The reason given was that it is a matter of prudential judgment, not a matter of law, whether or not the signature is genuine, and there is no such "reliability requirement" in the case of handwritten signatures. In order to establish functional equivalence between handwritten and electronic signatures, such a requirement should be deleted.

22 Belarus proposed that the message should be capable of being retrieved "in an unmodified state" because the message may reach the server for the e-mail address but is impossible to read due to incompatible coding or the message may be corrupted (Compilation of comments by governments and international organisations: Document A/CN.9/578/Add.3).

19 These rules focus on the control over the electronic message or the capability of retrieving the data message. It would be a matter of evidence to prove that the message was not retrievable because it was corrupted or hijacked or subject to a denial of service attack or, because of wrong clock settings, it was not sent at the purported time.

20 The place of dispatch is the place of the originator's place of business and the place of receipt is the addressee's place of business as determined in accordance with Art 6.

XIII. Formation and validity of contracts

21 The 1996 Model Law did not deal with the substantive law on contract formation. In this regard, the ICC Expert Group found it important to achieve harmonisation in the areas of conclusion of contracts, incorporation of terms, mistake and input errors. The Singapore Consultation Paper considered whether or not to include a provision on when an offer and acceptance in electronic form takes effect. Currently, this is unclear in the absence of authority but the better view appears to be that the general rule of receipt rather than the postal rule should apply to acceptances by electronic means. The Singapore Consultation Paper proposed that the Singapore Electronic Transactions Act should clarify which rule applies, for example, that an offer and an acceptance in the form of a data message become effective when they are received by the addressee.[23] However, the objection to this is that it will create a dual regime: one for paper-based contracts and the other for electronic contracts. Furthermore, no single rule of offer or acceptance could provide a complete solution in the face of evolving technology. A proposed solution was to allow parties to opt out of the default rule in respect of e-contracts. They could expressly exclude a contract from being formed by an exchange of e-mail or exclude a particular e-mail from constituting a binding offer or acceptance. This will create certainty and ensure protection irrespective of whether the parties are aware of the provision. Alternatively, parties could opt in to such a regime.

23 In fact contained in earlier versions of the draft Convention, Document A/CN.9/WG.IV/WP.103, Art 13(2), para 2. Article 13 was deleted at the 42nd session of the ECWG as it dealt with substantive law which the draft Convention was not supposed to affect. The Vienna Sales Convention provides that "an offer becomes effective when it reaches the offeree" (Art 15(1)) and "an acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror" (Art 18(2)).

22 As for "battle of forms" problems, the ICC Expert Group recognised the difficulties in resolving the problem. Article 19 of the Vienna Sales Convention provides one such solution.[24]

XIV. New concerns

23 New legal concerns in the electronic environment such as input errors in e-contracting, use of automated information systems for contract formation and invitations to treat are addressed in the Convention.

XV. Invitation to make offers: Article 11

24 Article 11 of the Convention provides that a proposal for concluding a contract making use of information systems, including proposals that make use of interactive applications for the placement of orders through such information systems, that are not addressed to one or more specific persons, are to be treated as invitations to make offers, unless they indicate the intention of the proposer to be bound in case of acceptance. This is analogous with "real world" offers traditionally made to the world at large and to clarify issues that have gained significance since the advent of the Internet, namely the inability of the seller with limited stock to fulfil all purchase orders and online pricing errors. It also protects consumers from being bound unwittingly through spam or click-through agreements.[25] As UNCITRAL explained, the use of the word "interactive applications" in preference to "automated system" would objectively indicate to any person accessing that system that it was prompted to exchange information through that system with an appearance of automaticity. Thus announcements and homepages of electronic sites are deemed to be invitations to treat. If treated as offers, then the liability of businesses will be limitless and they will be subject to the laws of as many jurisdictions as there are buyers. This default rule which is subject to the contrary intention of the parties, while giving

24 Under Art 19 of the Vienna Sales Convention, acceptance with modifications amounts to a counter-offer if it contains material differences as to price, payment, quality or quantity of goods, time or place of delivery, extent of one party's liability to the other or the manner of settling disputes. Therefore there is no contract unless the counter-offer (new offer) is accepted. Non-material additions become acceptance (of the terms) unless the offeror promptly objects orally or in writing. If the offeror does not so object, the terms of the contract will comprise the original terms of offer and the modifications contained in the acceptance.

25 As explained by the Report of the ECWG at the 41st session.

effect to party autonomy, provides greater certainty to businesses with regard to the legal effect of proposals made to the world at large.

XVI. Automated message systems: Article 12

25 The Convention recognises that it is now possible to conclude a contract by electronic agents without any human intervention. The Convention defines an "automated message system" as "a computer program or an electronic or other automated means used to initiate an action or respond to data messages or performances in whole or in part, without review or intervention by a natural person each time an action is initiated or a response is generated by the system".[26] This is necessary to give legal effect to the acts of electronic agents which are increasingly used in e-commerce (for example, bidding systems on Internet auction sites; online supplier and data exchange systems). These are likely to flourish as e-commerce grows and electronic agents facilitate efficient online transactions.

26 To clarify that automated means of communication can convey the intention necessary in contract formation, Art 12 of the Convention provides that a contract is valid and enforceable when one or both parties have interacted in the contracting process by using an automated message system without review by any person or when a contract is formed by the interaction of two automatic message systems. Article 12 reflects the "spirit of the times".

27 Other issues related to the use of automated information systems such as conflicting contract terms and attribution are too complicated to be capable of statutory solution. Hence these are not dealt with in the Convention. While an automated message system can check for pre-programmed specifics, it may not be able to recognise non-standard terms. If the contract is concluded by the system, is the user bound by the terms? As for attribution, with the wide range of sophisticated automated systems available, finding an acceptable solution will be difficult and the Convention does not deal with this. The Singapore Electronic Transactions Act deals with attribution in s 13 and it is unclear how this applies to automated information systems.

26 Article 4(*g*) of the Convention.

XVII. Error in electronic communications: Article 14

28 The 1996 Model Law did not deal with the substantive law on contract formation and consequently did not deal with the legal effects of contracts formed as a result of an error. The reason was to avoid interfering with established notions of contract law. Instead, Art 14 of the Convention addresses a type of error specific to e-commerce, namely data input errors, in view of the potentially higher risk of error in real time or near instantaneous communications made between individuals and automated systems. It deals with the consequences of errors made in interactions between individuals and automated information systems that do not offer the individual an opportunity to review and correct the input error. Such a uniform rule is much needed in view of the differing and conflicting treatment of mistakes under domestic law. The Convention only deals with the inputting of wrong data or key-stroke errors, not with other kinds of mistakes (resulting, for example, from a misunderstanding of the terms or a business misjudgment) which are left to domestic law to resolve. To prevent key-stroke errors, websites often ask the user to confirm the information (for example, by means of confirmation screens) before the transaction is processed. If the user is not given the opportunity to do so, under the common law position, the contract will be allowed to stand unless it is obvious to a party that the other person had made a mistake.[27] The Convention requires a party offering goods or services through an automated information system to make available some technical means of identifying and correcting errors. In addition, the ECWG, inspired by s 22 of the Canadian Uniform Electronic Commerce Act,[28] considered the legal effects of errors made by a natural person communicating with an automated information system. The person making the error is entitled to withdraw the portion of the e-communication in which the error is made if:

> (a) the person is not given an opportunity to correct the error;
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> (b) the person notifies the other party of the error as soon as possible after discovering the error; and

27 See Ter Kah Leng, "Website Pricing Errors – Who Bears the Risk of Mistake?" *Computer Law and Security Report*, vol 20, Issue 5, pp 396–399 and "Legal Effects of Input Errors in E-Contracting" forthcoming in the *Computer Law and Security Report*.

28 Adopted by the Uniform Law Conference of Canada as of 30 September 1999.

(c) the person has not used or received any material benefit or value from the goods or services.

29 The earlier proposed requirement that the person takes reasonable steps to return the goods or services received or, if instructed to do so, to destroy them has been deleted at the suggestion of UNCITRAL because the consequences of the error is a matter for national law to determine.

30 UNCITRAL's recommendation with regard to the withdrawal of the erroneous portion as opposed to invalidating the whole contract after it has been formed is believed to be in the best interests of the development of e-commerce.

31 Article 14 is intended to supplement national law where the defence of mistake exists. It creates certainty and protects the consumer from unfair trade practices and allows individuals to avoid an electronic transaction on the basis of mistake in narrowly defined circumstances[29] and checks abuses based on bad faith. It "gives online merchants a way of giving themselves a good deal of security against allegations of mistake and encourages good business practices in everybody's interests".[30] This clarification of the law is timely as the ICC Expert Group questionnaire shows that businesses are unsettled by inconsistencies in national law on mistake and errors.

XVIII. Availability of contract terms: Article 13

32 The Convention does not affect any rule of law requiring any person who negotiates any contract terms through any electronic communications to furnish those e-communications that contain those terms to another person or relieve any person from the legal consequences of failing to do so.[31] This defers to national law and is consistent with the Convention's facilitative rather than regulatory approach.

29 See Singapore Consultation Paper *Joint IDA-AGC Review of the Electronic Transactions Act Stage III – Remaining Issues* (22 June 2005) at para 5.15.5.
30 Proceedings of Annual Meeting 1999 of the Uniform Law Conference of Canada.
31 Article 13 of the Convention.

XIX. Conclusion

33 While business seems to be adapting to the new electronic business environment, feedback to the ICC Expert Group shows that the main source of tension is uncertainty about when an e-communication is legally binding: *ie*, how to be bound when you want to and how not to be bound when you do not want to. Are e-communications, where there is a lack of formality, binding?[32] There is also confusion as to contract law relating to offer and acceptance, place of transmission and receipt, and the legal effect of acknowledgement of receipt, as well as security issues.

34 Companies have different needs depending on region, size and sector and different experiences with e-commerce, but they all agree on one thing – business practices in e-contracting are presently evolving and codification of this practice is premature. However, governments do not share this view. ICC, a close adviser to the UN, made submissions to UNCITRAL, raising the concern that the then draft Convention was not sufficiently responsive to either the scope or the nature of the problem. ICC's alternative was a package of voluntary model clauses, checklists and guidance documents. "Self-regulation is a better approach, says ICC, than the draft Convention".[33] However, responses received by the ICC Expert Group generally favour harmonisation as a means of reducing legal uncertainty in online contracting.

35 By adopting the Convention eventually, Singapore will be clearing up certain important e-contracting issues and providing more specific regulations than current standards set by the Model Law and incorporated into the Electronic Transactions Act.

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32 See Ter Kah Leng, "Concluding Leases By E-mail" *Computer Law and Security Report*, vol 21, Issue 5, pp 423–426.

33 Jonas Astrup, ICC Task Force Chairman, *Legal Times*, 21 July 2003.