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Legal aspects of electronic commerce

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

Note by the Secretariat*

1. At its thirty-second session, in 1999, the United Nations Commission on International Trade Law considered a recommendation that had been adopted on 15 March 1999 by the Centre for the Facilitation of Procedures and Practices for Administration, Commerce and Transport (now known as the Centre for Trade Facilitation and Electronic Business, CEFACT) of the Economic Commission for Europe.[1] That text recommended that UNCITRAL consider the actions necessary to ensure that references to "writing", "signature" and "document" in conventions and agreements relating to international trade allowed for electronic equivalents. Support was expressed for the preparation of an omnibus protocol to amend multilateral treaty regimes to facilitate the increased use of electronic commerce.

2. Other items suggested for future work included electronic transactional and contract law; electronic transfer of rights in tangible goods; electronic transfer of intangible rights; rights in electronic data and software (possibly in cooperation with the World Intellectual Property Organization); standard terms for electronic contracting (possibly in cooperation with the International Chamber of Commerce and the Internet Law and Policy Forum); applicable law and jurisdiction (possibly in cooperation with the Hague Conference on Private International Law); and online dispute settlement systems.[2]

* The submission of the present note by the secretariat of the United Nations Commission on International Trade Law was delayed owing to shortage of staff.

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3. The Commission took note of the above proposals. It was decided that, upon completing its current task, namely, the preparation of draft uniform rules on electronic signatures, the Working Group would be expected, in the context of its general advisory function regarding the issues of electronic commerce, to examine some or all of the above-mentioned items, as well as any additional items, with a view to making more specific proposals for future work by the Commission.[3]

4. The Working Group considered proposals for removing obstacles to electronic commerce in existing international conventions at its thirty-eighth session, in 2001, on the basis of a note by the Secretariat (A/CN.9/WG.IV/WP.89). That note reproduced an analysis of the public international law issues that would be raised by the actions necessary to ensure that references to "writing", "signature" and "document" in conventions and agreements relating to international trade allowed for electronic equivalents that had been prepared by Geneviève Burdeau, Professor at the University of Paris I—Panthéon Sorbonne, Associate of the International Law Institute and Secretary-General of the Hague Academy of International Law, at the request of the Secretariat.

5. The Working Group agreed to recommend to the Commission to undertake work towards the preparation of an appropriate international instrument or instruments to remove those legal barriers to the use of electronic commerce which might result from international trade law instruments. The Working Group also agreed to recommend to the Commission that the Secretariat be requested to carry out a comprehensive survey of possible legal barriers to the development of electronic commerce in international instruments, including, but not limited to, those instruments already mentioned in the CEFACT survey. Such a study should aim at identifying the nature and context of such possible barriers with a view to enabling the Working Group to formulate specific recommendations for an appropriate course of action. The study should be carried out by the Secretariat with the assistance of outside experts and in consultation with relevant international governmental and non-governmental organizations. The Commission endorsed that recommendation at its thirty-fourth session, in 2001.[4]

6. The purpose of the present note is to appraise the Working Group of the progress made by the Secretariat in carrying out the work entrusted to it by the Commission, following the recommendation of the Working Group. In anticipation of the endorsement by the Commission of the recommendation that had been made by the Working Group at its thirty-eighth session, the Secretariat had immediately thereafter begun with a survey of possible legal barriers to the development of electronic commerce in international instruments. For that purpose, the Secretariat used as a starting point the instruments already mentioned in the CEFACT survey. That list was then expanded to include other instruments relevant to trade law. At the current stage, the survey has been limited to instruments deposited with the Secretary-General. At a second stage, the survey might encompass international instruments deposited with other depositaries. The annex to the present note contains the results of the initial analysis of the instruments currently covered by the survey (33 international conventions altogether) and the preliminary conclusions as to the types of provision in each instrument that might create obstacles to electronic commerce.

7. The survey was limited to multilateral treaties registered with the Secretary-General of the United Nations that are listed under chapters X (International trade

and development), XI (Transport and communications), XXI (Law of the sea), and XXII (Commercial arbitration) of the "Status of Multilateral Treaties deposited with the Secretary-General".[1] Conventions registered with national Governments or other organizations, such as the International Civil Aviation Organization, the International Institute for the Unification of Private Law (Unidroit) or the Hague Conference on Private International Law, have not been included in the survey at the present stage. The survey does not cover bilateral treaties, model laws or non-governmental texts.

8. The Working Group may wish to review the work thus far carried out by the Secretariat and consider, in particular, whether the methodology used by the Secretariat in the conduct of the survey is appropriate to this project, as envisaged by the Working Group.

Notes

[1] The text of the recommendation to UNCITRAL is contained in document TRADE/CEFACT/1999/CRP.7. Its adoption by CEFACT is stated in the report of CEFACT on the work of its fiftieth session (TRADE/CEFACT/1999/19, para. 60).

[2] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 17* (A/52/17), para. 251, and ibid., *Fifty-third Session, Supplement No. 17* (A/53/17), para. 211.

[3] Ibid., *Fifty-fourth Session, Supplement No. 17* (A/54/17), paras. 315-318.

[4] In view of the proximity of the dates of the Commission's thirty-fourth session and the Working Group's thirty-ninth session, the report of the Commission on the work of that session was not yet available at the time the present note was prepared.

[5] Available from http://untreaty.un.org

Annex

Preliminary survey of possible obstacles to electronic commerce in international instruments relating to international trade deposited with the Secretary-General*

Contents**

* All references to the status of conventions and agreements are as at 5 February 2002.

** The number preceding the title of each instrument corresponds to the number under which the instrument appears in the respective chapter in the publication "Status of Multilateral Treaties Deposited with the Secretary-General".

I. International trade and development

3. Convention on Transit Trade of Land-locked States (New York, 8 July 1965)

Status: Entered into force on 9 June 1967 (27 signatories; 37 parties).

Source: United Nations, *Treaty Series*, vol. 597, No. 8641, p. 3.

Comments

1. The purpose of the Convention is to invite the contracting parties to give full recognition to the needs of land-locked States in the matter of transit trade, instead of special taxes and charges, and to provide an opportunity to States with no sea coast to enjoy identical rights and treatment to those accorded coastal States.

2. Pursuant to article 5, the contracting States undertake to use simplified documentation and expeditious methods in regard to customs, transport and other administrative procedures relating to traffic in transit for the whole transit journey in their territory. Insofar as the Convention does not establish the form of such documentation, it does not seem to create obstacles to the development of electronic commerce. Whether and to what extent such "simplified documentation and expeditious methods with regard to customs" may involve electronic communications is a matter left for domestic law implementing the Convention.

Conclusions

3. The provisions of the Convention are of a trade policy nature. They are addressed to States and do not establish rules directly applicable to private law transactions. Furthermore, the extent to which electronic communications may be substituted for paper-based documents for the purposes of the Convention is largely dependent upon the capability and readiness of public authorities in the contracting parties to the Convention to process such documents in electronic form.

4. Given the close relationship between the Convention and other international instruments on customs and trade facilitation matters, the Working Group may wish to consider any issues related to electronic commerce that might arise under the Convention together with its consideration of those other instruments (see, in particular, paras. 52-82 below).

7. Convention on the Limitation Period in the International Sale of Goods (New York, 14 June 1974) and Protocol thereto (Vienna, 11 April 1980)

Status: Entered into force on 1 August 1988 (Convention: 12 signatories; 24 parties; Protocol: 17 parties).

Source: United Nations, *Treaty Series*, vol. 1511, No. 26119, p. 1.

Comments

5. The purpose of the Convention is to adopt uniform rules governing the limitation period in the international sale of goods.

6. The Convention contains various references to written form as well as to paper documents or other forms of communication, some of which might give rise to uncertainties in connection with electronic commerce. Those provisions may be grouped under essentially four categories, as indicated below.

(a) Provisions that contemplate notices or declarations that may be exchanged by the parties

7. Various provisions of the Convention attribute certain legal effects to notices that may be exchanged or declarations that may be made by the parties.

8. For example, article 12 provides that "if, in circumstances provided for by the law applicable to the contract, one party is entitled to declare the contract terminated before the time for performance is due, and exercises the right, the limitation period in respect of a claim based on any such circumstances shall commence on the date on which the declaration is made to the other party". Another example is article 14, paragraph 2, which provides that, for the

purpose of establishing the time when a limitation period ceases to run upon commencement of arbitral proceedings, such proceedings are deemed to commence on the date on which a request that the claim in dispute be referred to arbitration is delivered at the habitual residence or place of business of the other party or, if that party has no such residence or place of business, then at that party's last known residence or place of business.

9. The Convention is silent as to whether such declarations or notices may be made by means of electronic communication. Neither does it specify when such declarations or notices are deemed to have been made or offer criteria that allow for such a determination in connection with electronic communications.

(b) Provisions that expressly contemplate written notices or communications, including definitions of "writing"

10. Various provisions in the Convention refer to communications that need to be made "in writing".

11. For example, article 18, paragraph 1, provides that, where legal proceedings have been commenced against one debtor, the limitation period prescribed in the Convention shall cease to run against any other party jointly and severally liable with the debtor, provided that the creditor informs such party in writing within that period that the proceedings have been commenced. Paragraph 2 of the same article provides further that, where legal proceedings have been commenced by a sub-purchaser against the buyer, the limitation period prescribed in the Convention shall cease to run in relation to the buyer's claim over against the seller, if the buyer informs the seller in writing within that period that the proceedings have been commenced.

12. Also, pursuant to article 20, where the debtor, before the expiration of the limitation period, acknowledges in writing his obligation to the creditor, a new limitation period of four years shall commence from the date of such acknowledgement. Further writing requirements are contained in article 22, which provides that the limitation period cannot be modified or affected by any declaration or agreement between the parties, except where the debtor, during the running of the limitation period, extends the period by a declaration in writing to the creditor.

13. The definition of "writing" in article 1, paragraph 3 (g), which includes "telegram and telex", may not prima facie include electronic communications.

(c) Provisions that refer to time and place of contract formation

14. The provisions relating to the sphere of application of the Convention are built upon essentially two elements: the "internationality" of the contract and the parties' location in the territories of different contracting States to the Convention at the time the contract is concluded (see arts. 2, subpara. (a), and 3, para. 1 (a)).

15. Those provisions may give rise to difficulties in electronic commerce, since most systems of contract law use the notions of dispatch and receipt of offer and acceptance for the purpose determining the time of contract formation. It may be difficult to determine the place at which a message has been either dispatched or received. Transmission protocols of data message between different information systems usually register the moment when a message is delivered from one information system to another or the moment when it is effectively received or read by the addressee. However, transmission protocols do not usually indicate the geographical location of the communication systems.

(d) Provisions that refer to an existing undertaking or agreement between the parties

16. Some provisions of the Convention refer to an underlying undertaking or agreement between the parties to which the Convention attaches certain consequences in connection with the limitation period.

17. Article 11 provides that if the seller has given an express undertaking relating to the goods that is stated to have effect for a certain period of time, whether expressed in terms of a specific period of time or otherwise, the limitation period in respect of any claims arising from the undertaking shall commence on the date on which the buyer notifies the seller of the fact on which the claim is based, but not later than on the date of the expiration of the period of the undertaking.

18. As with the provisions contemplating notices or declarations (see paras. 7-9 above), the Convention is silent as to whether such undertaking may be made by

means of electronic communication. Neither does it specify when such undertaking is deemed to have been made or offer criteria that allow for such a determination in connection with electronic communications.

19. Also, article 14 provides that, where the parties have agreed to submit to arbitration, the limitation period shall cease to run when either party commences arbitral proceedings in the manner provided for in the arbitration agreement or by the law applicable to such proceedings. This provision supposes the validity of the arbitration agreement, but does not itself establish any requirements as to the form of such agreement, which is implicitly left for the law applicable to the arbitration agreement.

Conclusions

20. The Working Group may wish to consider whether the types of issue related to electronic contracting raised under the Convention might not be addressed in the context of its deliberations on the development of an international instrument dealing with some issues of electronic contracting (see A/CN.9/WG.IV/WP.95).

10. United Nations Convention on Contracts for the International Sale of Goods (Vienna, 11 April 1980)

Status: Entered into force on 1 January 1988 (18 signatories; 61 parties).

Source: United Nations, *Treaty Series*, vol. 1489, No. 25567, p. 3.

Comments

21. The purpose of the Convention is to adopt a set of uniform rules for the contracts for the sale of goods between parties whose places of business are in different States, in order to eliminate legal barriers and promote the development of international trade.

22. The issues of electronic contracting that might arise under the Convention were extensively analysed in an earlier note by the Secretariat (A/CN.9/WG.IV/WP.91) and considered by the Working Group at its thirty-eighth session (see A/CN.9/484, paras. 94-127). Some of those issues are also discussed in a more recent note by the Secretariat (A/CN.9/WG.IV/WP.95). For purposes of economy, the present note does not repeat those considerations, but adds only the following brief comments.

23. Generally, the issues of electronic contracting that might arise under the Convention fall largely under the same categories that have been identified above in respect of the Convention on the Limitation Period in the International Sale of Goods, with the additions indicated below.

(a) Nature of goods covered by the Convention

24. The Convention has been held to apply only to contracts for the international sale of “goods”, a term that has traditionally been understood to refer basically to movable tangible goods, thus excluding intangible assets, such as patent rights, trademarks, copyrights and a quota of a limited liability company, as well as know-how.

25. In its initial discussion on issues of electronic contracting, there was general agreement within the Working Group that existing international instruments, notably the United Nations Sales Convention, did not cover a variety of transactions currently made online and that it might be useful to develop harmonized rules to govern international transactions other than sales of movable tangible goods in the traditional sense (A/CN.9/484, para. 115). The Working Group was nevertheless reminded that, in practice, it was not always possible to draw a clear line between contracts for the sale of goods and contracts for the provision of services. Clear examples of the difficulty of distinguishing between goods and services could be found in transactions involving entertainment articles such as music or video records. The sale online of articles such as minidisks or videotapes would usually be regarded as a sale of goods, whereas the offering of online broadcasts of movies, television shows or music concerts would seem to fall into the category of services. However, modern technology also offered the possibility of purchasing digitalized music or video files that could be downloaded directly from the seller’s web site, without delivery of any tangible medium. The intent of the parties, it was suggested, had to be more closely examined in order to determine whether the transaction involved goods or services (A/CN.9/484, para. 117).

(b) Definition of performance in electronic commerce

26. Various provisions of the Convention refer to the obligations of seller and buyer in respect of delivery of goods. Article 60, for example, provides that the buyer's obligation to take delivery consists of: (a) doing all the acts that could reasonably be expected of him in order to enable the seller to make delivery; and (b) taking over the goods. The nature of such acts is well understood in connection with the delivery of tangible goods. However, to the extent that the Convention might be interpreted as covering the sale of products other than tangible movable goods (see previous comment under (a) above), questions might arise as to what acts constitute effective delivery of such goods.

Conclusions

27. In general, the issues raised by the Convention are issues of electronic contracting, as understood by the Working Group (see A/CN.9/WG.IV/WP.95, paras. 10-12). The Working Group may thus wish to consider whether those issues might not be addressed in the context of its deliberations on the development of an international instrument dealing with some issues of electronic contracting (see A/CN.9/WG.IV/WP.95).

12. United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 9 December 1988)

Status: Not yet in force (3 signatories; 3 parties).

Source: General Assembly resolution 43/165, annex.

Comments

28. The purpose of the Convention is to overcome the disparities and uncertainties that currently exist in international trade when international bills of exchange or international promissory notes are used as an instrument for international payment.

29. Bills of exchange and promissory notes are negotiable instruments under most legal systems. As such, the legal regime governing those instruments typically presupposes the existence of an instrument that, at least at some point, exists in tangible documentary form. In an earlier note, the Secretariat analysed various legal issues that arise in connection with developing an electronic equivalent to paper-based negotiable instruments (A/CN.9/WG.IV/WP.90). In order to avoid unnecessary repetition, the following paragraphs summarize some of the considerations made in that note.

30. Surmounting the issues of writing and signature in an electronic context does not solve the issue of negotiability, which has been said to be perhaps the most challenging aspect of implementing electronic data interchange in international trade practices. Rights represented by documents of title, such as bills of lading or warehouse receipts, are typically conditioned by the physical possession of an original paper document. Analyses of the legal basis for the negotiability of documents of title have indicated that there is generally no statutory means in place by which commercial parties, through the exchange of electronic messages, can validly transfer legal rights in the same manner possible with paper documents.

31. That conclusion is also essentially valid for rights represented by negotiable instruments such as bills of exchange or promissory notes. Moreover, the legal regime of negotiable instruments is in essence based on the technique of a tangible original paper document, susceptible to immediate visual verification on the spot. In the present state of legislation, negotiability cannot be divorced from the physical possession of the original paper document.

32. Thus, it has been said that one challenge in developing law to accommodate electronically transmitted documents of title is to generate them in such a way that holders who claim due negotiation will feel assured that there is a document of title in existence, that it has no defects upon its face, that the signature, or some substitute therefor is genuine, that it is negotiable and that there is a means to take control of the electronic document equivalent in law to physical possession (A/CN.9/WG.IV/WP.90, para. 36).

33. The development of electronic equivalents to documents of title and negotiable instruments would therefore require the development of systems by which transactions could actually take place using electronic means of communication. That result could be achieved through a registry system, where transactions would be recorded and managed through a central authority, or through a technical device based on cryptography that ensures the singularity of the

relevant data message. In the case of transactions that would have used transferable or quasi-negotiable documents to transfer rights that were intended to be exclusive, either the registry system or the technical device would need to provide a reasonable guarantee as to the singularity and the authenticity of the transmitted data.

Conclusions

34. In view of the particular nature of the issues raised by electronic substitutes for negotiable instruments, it appears that a comprehensive new legal framework might be required in order to allow for the international use of data messages in lieu of paper-based negotiable instruments. The Secretariat submits that developing such a comprehensive legal framework might go beyond the scope of the Working Group's efforts to remove obstacles to electronic commerce in existing instruments related to international trade. The Secretariat further submits that an analysis of the specific requirements for such a comprehensive legal framework might best be undertaken in the course of the Working Group's consideration of legal issues related to the transfer of rights, in particular, rights in tangible goods, by electronic means (see A/CN.9/484, paras. 87-93).[a]

13. United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 17 April 1991)

Status: Not yet in force (5 signatories; 2 parties).

Source: A/CONF.152/13.

Comments

35. The purpose of the Convention is to facilitate the movement of goods by establishing uniform rules concerning liability for loss of or damage to or delay in handing over such goods when they are in the charge of operators of transport terminals. These goods are not necessarily covered by the laws of carriage arising out of conventions applicable to the various modes of transport.

36. The Convention contains a number of provisions relating to communications between the private parties involved, which to a greater or lesser extent may give rise to doubts as to the acceptability of electronic communications for the purposes contemplated in it. The relevant provisions fall generally under the same categories that have been described above in connection with the Convention on the Limitation Period in the International Sale of Goods (see paras. 7-19 above).

37. Some of those provisions are already formulated in a manner intended to accommodate electronic means of communication. This is the case, for instance, of the definitions of "notice" ("a notice given in a form which provides a record of the information contained therein"); and "request" ("a request made in a form which provides a record of the information") contained in subparagraphs (e) and (f), respectively, of article 1. The Convention uses the notion of "notice" essentially in connection with communications of loss of or damage to goods handed over to an operator of a transport terminal (see, for instance, art. 11, paras. 1-3 and 5) and the notion of "request" in connection with the customer's demand for the issuance of an acknowledgement of receipt in respect of the goods (see, for instance, art. 4, para. 1) and requests for delivery of the goods (see, for instance, art. 5, paras. 3 and 4).

38. Potentially more problematic, however, seem to be the form requirements for the instrument whereby the operator of the transport terminal acknowledges receipt of the goods. Indeed article 4, paragraph 1 (a) and (b), of the Convention, besides referring to "signature", uses for that purpose the term "document" in a context that appears to presuppose the use of a tangible medium. Those provisions read as follows:

> "The operator may, and at the customer's request shall, within a reasonable period of time, at the option of the operator, either:
>
> "(a) Acknowledge his receipt of the goods by signing and dating a document presented by the customer that identifies the goods, or
>
> "(b) Issue a signed document identifying the goods, acknowledging his receipt of the goods and the date thereof, and stating their condition and quantity in so far as they can be ascertained by reasonable means of checking."

39. It should be noted that the "document" envisaged by the Convention is not a document of title to the goods, but only evidence of custody of the goods by

the operator of the transport terminal. The main issue that might be raised by the use of electronic communications for this purpose would thus relate to the evidentiary value of such communications, rather than to their effectiveness for the purpose of conferring title to the goods.

Conclusions

40. The Working Group may wish to consider whether the types of issue of electronic contracting raised under the Convention might not be addressed in the context of its deliberations on the development of an international instrument dealing with some issues of electronic contracting (see A/CN.9/WG.IV/WP.95).

15. United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 11 December 1995)

Status: Entered into force on 1 January 2000 (4 signatories; 6 parties).

Source: A/50/640 and Corr.1, annex.

Comments

41. The purpose of the Convention is to regulate and facilitate the use of independent guarantees and stand-by letters of credit given by a bank or other institution or person to pay to the beneficiary a certain or determinable amount upon simple demand or upon demand accompanied by other documents.

42. The Convention contains a number of provisions relating to communications between the parties involved. The relevant provisions fall generally under the same categories that have been described above in connection with the provisions of the Convention on the Limitation Period in the International Sale of Goods (see paras. 7-19).

43. Examination of the relevant provisions allows the conclusion that the Convention already provides for the use of electronic communications, as pointed out in the CEFACT survey (see TRADE/CEFACT/1999/CRP.7, para. 2.22.3).

44. Indeed, article 6, subparagraph (g), defines "document" as a communication made "in a form that provides a complete record thereof", which is intended to include an electronic message. Article 7, paragraph 2, further provides that an "undertaking" covered by the Convention, which includes a guarantee or credit, may be issued in "any form which preserves a complete record of the text of the undertaking and provides authentication of its source by generally accepted means or by a procedure agreed upon by the guarantor/issuer and the beneficiary".

45. Also, article 11, paragraph 2, of the Convention expressly refers to the possibility of issuance of an undertaking "in non-paper form" and recognizes the right of the parties to agree on "a procedure functionally equivalent to the return of the document" in such a case.

Conclusions

46. The Working Group may wish to consider that the Convention does not create obstacles to the use of electronic means of communications as an alternative to the issuance and exchange of paper-based documents and that therefore no particular action with regard to the Convention is needed.

II. Transport and communications instruments

A. Customs matters

General background note

47. In the context of its analysis of possible obstacles to electronic commerce under conventions that relate to customs matters, the Working Group may wish to note that international organizations and domestic customs authorities have been working for many years in the development of electronic systems for processing customs documentation and information.

48. As early as two decades ago, the Customs Cooperation Council (known as the World Customs Organization) adopted a "Recommendation concerning the transmission and authentication of customs information which is processed by computer", of 16 June 1981, inviting customs authorities to take steps to allow the use of electronic communications (see http://www.wcoomd.org/ie/En/Recommendations/authen_rece.htm). In particular, the World Customs Organization recommended the following:

(a) To allow, under conditions to be laid down by the customs authorities, declarants to use various electronic media (value-added networks, national postal, telegraph and telephone (ptt) agency, disc, tape, etc.) for the transmission of customs regulatory information to the customs authorities for automatic processing and to receive an automatic response to such information from the customs;

(b) To accept, under conditions to be laid down by the customs authorities, customs regulatory information from declarants and other government agencies, which is transmitted by use of electronic media, validated and authenticated by security technology, without the need to produce paper documentation with a hand-written signature;

(c) To accept, where legal recognition of electronically transmitted customs regulatory information is not resolved, that the customs should authorize declarants, under conditions to be laid down by the customs or other competent authorities, to produce customs regulatory information on plain paper;

(d) To accept, where electronic data interchange security and automated processing techniques are used but where, owing to legal constraints, the production of paper documentation and hand-written signatures are required, the periodic submission of paper documentation or their storage on the premises of the declarant, under conditions laid down by the customs administration.

49. In 1990, the World Customs Organization recommended that members of the Organization and all Member States of the United Nations or its specialized agencies and customs or economic unions apply the United Nations/Electronic Data Interchange for Administration, Commerce and Transport (EDIFACT) rules for the preparation of electronic messages to be interchanged between customs administrations and between customs administrations and that other trade users make use of United Nations/EDIFACT (see "Recommendation of the Customs Cooperation Council concerning the use of the UN/EDIFACT rules for electronic data interchange", of 26 June 1990, available from http://www.wcoomd.org/ie/En/Recommendations/Recom2.html).

50. One significant practical international initiative is the Automated System for Customs Data (ASYCUDA), a computerized customs management system developed by the United Nations Conference for Trade and Development that covers most foreign trade procedures (see http://www.asycuda.org). The System handles manifests and customs declarations, accounting procedures, transit and suspense procedures. ASYCUDA generates trade data that can be used for statistical economic analysis and takes into account the international codes and standards developed by the International Organization for Standardization, the World Customs Organization and the United Nations. ASYCUDA can be configured to suit the national characteristics of individual customs regimes, national tariffs and customs legislation. ASYCUDA provides for electronic data interchange between traders and customs authorities using EDIFACT rules. ASYCUDA has been or is being installed in some 60 countries and it is expected that the number of user countries will grow to 100, making it the de facto world standard for customs.

51. At the national level, a survey conducted by the World Customs Organization indicates that automatization of at least some customs procedures has been one of the main components of most national initiatives to modernize customs procedures (see http://www.wcoomd.org/hrds/surve_e.htm#INTRODUCTION).

5. International Convention to Facilitate the Importation of Commercial Samples and Advertising Material (Geneva, 7 November 1952)

Status: Entered into force on 20 November 1955 (6 signatories; 63 parties).

Source: United Nations, *Treaty Series*, vol. 221, No. 3010, p. 255.

Comments

52. The purpose of the Convention is to promote international trade through the exemption of import duties, customs duties and all other duties and taxes payable on or in connection with importation of commercial samples and advertising material of negligible value.

53. The Convention requires the contracting parties to exempt from import duties catalogues, price lists and trade notices relating to goods offered for sale or

hire, or transport or commercial insurance services offered by a person established in the territory of another contracting party, when such documents are imported from the territory of any contracting party.

54. The references made in article IV of the Convention to the number of "documents or copies", or "consignments", including their maximum "gross weight", clearly suggest that the Convention applies primarily to materials printed on a tangible medium. Arguably, the Convention might be construed to apply to the importation of samples and advertising materials where such materials are stored in electronic form on a tangible medium (such as a diskette or a CD-ROM). However, it seems doubtful that the Convention could apply to the most common "electronic equivalents" of the importation of advertising materials, such as publicizing advertising materials or product catalogues internationally via the Internet, since in most instances the act of posting such information on a web site might take place entirely at one jurisdiction only, without any cross-border communication of data.

Conclusions

55. The provisions of the Convention are of a trade policy nature. They are addressed to States and do not establish rules directly relevant for private law transactions. The Working Group may therefore wish to consider that further study on issues related to electronic commerce under the Convention should be more appropriately carried out by other international organizations, such as the World Trade Organization or the World Customs Organization. The Working Group may further wish to request the Secretariat to follow any work that those organizations might undertake and report on their progress at a later stage.

9. Customs Convention on Containers (Geneva, 18 May 1956)

Status: Entered into force on 4 August 1959 (12 signatories; 43 parties).

Source: United Nations, *Treaty Series*, vol. 338, No. 4834, p. 103.

Comments

56. The purpose of the Convention is to develop and facilitate the use of containers in international trade. The Convention has been terminated and replaced, in the relations between the parties thereto, by the 1972 Customs Convention on Containers (see below). However, since a number of the contracting parties to the 1956 Convention have not yet ratified or adhered to the 1972 Convention, the 1956 Convention remains in force. In its review of the 1956 Convention, the Secretariat has not found any provisions that might be directly relevant to electronic commerce.

15. Customs Convention on Containers, 1972 (Geneva, 1 December 1972)

Status: Entered into force on 6 December 1975 (15 signatories; 29 parties).

Source: United Nations, *Treaty Series*, vol. 988, No. 14449, p. 43.

Comments

57. The purpose of the Convention is to grant temporary admission to containers, whether loaded with goods or not, which should be re-exported within three months in order to facilitate international carriage by container.

58. The Convention contains a few requirements concerning documentation to be presented by importers or exporters of containers to customs authorities or records to be kept by them.

59. Article 8, for example, provides that the contracting parties may, under certain circumstances, "require the furnishing of a form of security and/or the production of customs documents on the importation or re-exportation of the container". Also, annex 2, paragraph 1, requires the contracting party to use, for checking movements of containers granted temporary admission, "the records kept by the owners or operators or their representatives". Annex 2, paragraph 2 (b), further requires the container operator to "undertake in writing", inter alia, to supply the competent customs authorities with certain information. Since the Convention does not contain definitions of terms such as "document", "undertaking" or "writing", questions may be raised as to whether those requirements might be met by information provided in the form of data messages.

Conclusions

60. The provisions of the Convention are of a trade policy nature. They are addressed to States and do not establish rules directly relevant for private law transactions. Furthermore, the extent to which electronic communications may be substituted for paper-based documents for the purposes of the Convention is largely dependent upon the capability and readiness of public authorities in the contracting parties to the Convention to process such documents in electronic form.

61. The Working Group may therefore wish to consider that further study on issues related to electronic commerce under the Convention should be more appropriately carried out by other international organizations, such as the World Trade Organization or the World Customs Organization. The Working Group may further wish to request the Secretariat to follow any work that those organizations might undertake and report on their progress at a later stage.

13. Customs Convention on the International Transport of Goods under Cover of TIR Carnets (Geneva, 15 January 1959)

Status: Entered into force on 7 January 1960 (9 signatories; 37 parties).

Source: United Nations, *Treaty Series*, vol. 348, No. 4996, p. 13, vol. 481, p. 598.

Comments

62. The purpose of the TIR Convention is to regulate international transport of goods without intermediate reloading across one or more frontiers between a customs office of departure of one contracting party and a customs office of destination of another contracting party.

63. The Convention has been terminated and replaced, in the relations between the parties thereto, by the 1975 TIR Convention (see below). Since all but one of the contracting parties of the Convention have ratified or adhered to the new TIR Convention, the Secretariat's comments are limited to the 1975 TIR Convention.

16. Customs Convention on the International Transport of Goods under Cover of TIR Carnets (Geneva, 14 November 1975)

Status: Entered into force on 20 March 1978 (16 signatories; 64 parties).

Source: United Nations, *Treaty Series*, vol. 1079, No. 16510, p. 89.

Comments

64. The purpose of the TIR Convention is to facilitate the international carriage of goods by road vehicles by simplifying and harmonizing administrative formalities in the field of international transport, in particular at frontiers.

65. According to the *TIR Handbook*, a publication of the secretariat of the Economic Commission for Europe (ECE), which administers the TIR Convention, the essential principles and features of the transit system established by the TIR Convention are the following: (a) goods are required to travel in secure vehicles or containers; (b) throughout the journey, duties and taxes at risk should be covered by an internationally valid guarantee; (c) goods need to be accompanied by an internationally accepted document ("TIR carnet") taken into use in the country of departure and serving as a customs control document in the countries of departure, transit and destination; (d) customs control measures taken in the country of departure should be accepted by the countries of transit and destination; and (e) access to the TIR procedure, both for national associations issuing TIR carnets and for natural and legal persons utilizing TIR carnets requires authorization by competent national authorities (see http://www.unece.org/trans/new_tir/handbook/english/intro.htm).

66. As pointed out in the CEFACT survey, the TIR Convention revolves fundamentally around the issue and use of a paper-based document, the TIR carnet. Moreover, not only does the Convention not envisage the use of electronic data interchange but the present carnet is not aligned to the United Nations system (TRADE/CEFACT/1999/CRP.7, para. 2.23.3). Another difficulty in replacing the TIR system by electronic communications relates to the very function of the TIR carnet as acceptable proof to domestic customs

authorities of the existence of an international guarantee covering import duties and taxes in respect of the goods transported under the TIR system.

67. Furthermore, the TIR carnet fulfils other evidentiary functions, such as under various provisions of the Convention that require customs authorities of the contracting States to record certain information on the TIR carnet vouchers used in their country, on the corresponding counterfoils and on the vouchers remaining in the TIR carnet, such as particulars of the seals affixed and of the controls carried out on the load of a road vehicle, combination of vehicles or container in the course of the journey or at a customs office en route (see arts. 24, 34 and 35).

68. According to information published by the International Road Transport Union, the TIR system has operated smoothly for four decades since the TIR Convention was first implemented (see http://www.iru.org/TIR/TirSystem.E.htm). At the beginning of the 1990s, however, owing to the increase in trade volumes and the number of road hauliers performing TIR operations, the number of infringements of the TIR procedure also increased. A new means of controlling the system had to be found. Consequently the Administrative Committee for the TIR Convention adopted a recommendation on 20 October 1995 that provides for electronic confirmation of the discharge of a TIR operation in addition to the existing paper-based system. The goal of the SafeTIR system is to provide the status of the TIR carnet to the customs and the association issuing the TIR carnet with a confirmation, directly from the customs authorities, of the final or partial discharge of the TIR carnet, mainly to enable comparison of that confirmation against the paper-based discharge. The confirmation should reach the issuing association within one week.

69. Further efforts to adapt the TIR system to electronic means of communication are currently under way. At its ninety-ninth session, held in Geneva from 23 to 26 October 2001, the ECE Working Party on Customs Questions affecting Transport decided to establish an Ad Hoc Expert Group on the Conceptual and Technical Aspects of the Computerization of the TIR Convention and an Ad Hoc Expert Group on the Legal Aspects of the Computerization of the TIR Convention.

70. The first session of the Ad Hoc Expert Group on the Conceptual and Technical Aspects of the Computerization of the TIR Convention was held in Geneva on 24 and 25 January 2002. At that session, the informal Ad Hoc Expert Group started its consideration of the conceptual and technical aspects of the computerization of the TIR procedures, including the financial and administrative implications of its introduction, both at the national and the international level. It is expected that the work of the Ad Hoc Expert Group will lead to the preparation of a draft set of electronic messages to allow for an interchange of electronic data, nationally, between contracting parties and with international organizations.

71. [The report of the meeting of the Ad Hoc Expert Group had not yet been published at the time the present note was prepared, but will eventually be available from the web site of the ECE Transport Division (http://www.unece.org/trans/new_tir/home.html)]

Conclusions

72. In view of the particular nature of the regime established by the TIR Convention, which requires the issuance of original documents capable of being read and processed by the customs and other authorities of the various contracting parties, the Working Group may wish to request the Secretariat to continue following the current efforts being undertaken under the auspices of ECE and report on their progress at a later stage.

14. European Convention on Customs Treatment of Pallets used in International Transport (Geneva, 9 December 1960)

Status: Entered into force on 12 June 1962 (8 signatories; 28 parties).

Source: United Nations, *Treaty Series*, vol. 429, No. 6200, p. 211.

Comments

73. The purpose of the Convention is to facilitate international carriage by containers, by granting admission without payment of import duties and taxes and free of import prohibitions or restrictions to pallets, under certain conditions, to encourage the use

of pallets in international transportation and to reduce its cost. In its review of the Convention the Secretariat has not found any provisions that might be directly relevant to electronic commerce.

17. International Convention on the Harmonization of Frontier Controls of Goods (Geneva, 21 October 1982)

Status: Entered into force on 15 October 1985 (13 signatories; 41 parties).

Source: United Nations, *Treaty Series*, vol. 1409, No. 23538, p. 3.

Comments

74. The purpose of the Convention is to facilitate the international movement of goods by reducing the requirements for completing formalities as well as the number and duration of controls when being moved across one or more maritime, air or inland frontiers.

75. As pointed out in the CEFACT survey, the Convention itself is no barrier to the use of electronic communications (TRADE/CEFACT/1999/CRP.7, para. 2.24.3). Article 9, paragraph 1, of the Convention promotes the use of documents aligned on the United Nations layout key. Paragraph 2 of the same article requires contracting parties to accept documents produced by any appropriate technical process, provided that they comply with official regulations as to their form, authenticity and certification and that they are legible and understandable.

76. It should be noted, however, that the Convention does not override existing form requirements under domestic law or international agreements entered into by the contracting States. Thus, if individual laws require hard-copy documents, such requirements will remain applicable despite article 9, paragraph 2, of the Convention.

Conclusions

77. The provisions of the Convention are of a trade policy nature. They are addressed to States and do not establish rules directly relevant for private law transactions. Furthermore, the extent to which electronic communications may be substituted for paper-based documents for the purposes of the Convention is largely dependent upon the capability and readiness of public authorities in the contracting parties to the Convention to process such documents in electronic form.

78. The Working Group may therefore wish to consider that further study on issues related to electronic commerce under the Convention should be more appropriately carried out by other international organizations, such as the World Trade Organization or the World Customs Organization. The Working Group may further wish to request the Secretariat to follow any work that those organizations might undertake and report on their progress at a later stage.

18. Convention on Customs Treatment of Pool Containers used in International Transport (Geneva, 21 January 1994)

Status: Entered into force on 17 January 1998 (7 signatories; 11 parties).

Source: ECE/TRANS/106.

Comments

79. The purpose of the Convention is to facilitate the use in common of containers by members of a pool, thus enhancing the efficient use of containers in international transport.

80. The Convention has a few provisions contemplating an agreement between the members of a container pool and written undertakings to be entered into by the parties that may generally give rise to the same types of issue as those raised under similar provisions in the Convention on the Limitation Period in the International Sale of Goods (see paras. 7-19 above). More specifically, article 5, paragraph 1 (b), requires the members of a pool, inter alia, to "(ii) keep records, for each type of container, showing the movement of containers so exchanged". It should be noted that article 5, paragraph 3 (b), makes the applicability of the facilities provided in article 4 (tax-free importation of containers, exemption from presentation of customs documents) subject to communication of the pool agreement to, and approval by, the competent customs authorities.

Conclusions

81. The provisions of the Convention are of a trade policy nature. They are addressed to States and do not establish rules directly relevant for private law transactions. Furthermore, the extent to which electronic communications may be substituted for paper-based documents for the purposes of the Convention is largely dependent upon the capability and readiness of public authorities in the contracting parties to the Convention to process such documents in electronic form.

82. The Working Group may therefore wish to consider that further study on issues related to electronic commerce under the Convention should be more appropriately carried out by other international organizations, such as the World Trade Organization or the World Customs Organization. The Working Group may further wish to request the Secretariat to follow any work that those organizations might undertake and report on their progress at a later stage.

B. Road traffic

1. Convention on Road Traffic (Geneva, 19 September 1949)

Status: Entered into force on 25 March 1952 (19 signatories; 91 parties).

Source: United Nations, *Treaty Series*, vol. 125, No. 1671, p. 3.

Comments

83. The purpose of the Convention is to harmonize the rules governing road traffic among contracting States, ensure their compliance in order to facilitate international road traffic and increase road safety. The provisions of the Convention deal essentially with road safety and traffic control issues and do not establish rules directly relevant for private law transactions. The Working Group may wish to consider that no action is required in respect of the Convention.

19. Convention on Road Traffic (Vienna, 8 November 1968)

Status: Entered into force on 21 May 1977 (36 signatories; 59 parties).

Source: United Nations, *Treaty Series*, vol. 1042, No. 15705, p. 17.

Comments

84. The purpose of the Convention is to facilitate international road traffic and to increase road safety through the adoption of uniform traffic rules. In its review of the Convention the Secretariat has not found any provisions that might be directly relevant to electronic commerce. The Working Group may wish to consider that no action is required in respect of the Convention.

8. General Agreement on Economic Regulations for International Road Transport and (a) Additional Protocol; and (b) Protocol of Signature (Geneva, 17 March 1954)

Status: Not yet in force (10 signatories; 4 parties).

Source: E/ECE/186 (E/ECE/TRANS/460).

Comments

85. The purpose of the General Agreement is to favour the development of the international carriage of passengers and goods by road by establishing a common regime for international road transport. In its review of the Agreement the Secretariat has not found any provisions that might be directly relevant to electronic commerce. The Working Group may wish to consider that no action is required in respect of the Agreement.

11. Convention on the Contract for the International Carriage of Goods by Road (Geneva, 19 May 1956) and Protocol thereto (Geneva, 5 July 1978)

Status: Entered into force on 2 July 1961 (Convention: 9 signatories; 44 parties; Protocol: 6 signatories; 30 parties).

Source: United Nations, *Treaty Series*, vol. 399, No. 5742, p. 189.

Comments

86. The purpose of the CMR Convention is to regulate and standardize the conditions surrounding the contract for international carriage of goods by road in vehicles when the place of taking over of the goods and the place designated for delivery are situated in two different countries, of which at least one is a contracting State. In its current form, the Convention contemplates some documentary requirements that might not be easily replaced with electronic communications (see paras. 87-97) and, for that reason, consideration is being given to its revision (see paras. 98-103).

(a) Possible obstacles to the use of electronic communications under the Convention

87. The provisions of the Convention that have special relevance for the use of electronic communications may be generally grouped under two categories: (a) provisions concerning the instrument of the contract of carriage (consignment note); and (b) provisions that contemplate notices or declarations that may be exchanged by the parties.

(i) Provisions concerning the instrument of the contract of carriage (consignment note)

88. Article 4 of the Convention requires that contract of carriage "be confirmed by the making out of a consignment note" even though "the absence, irregularity or loss of the consignment note shall not affect the existence or the validity of the contract of carriage", which shall remain subject to the provisions of the Convention. The Convention does not define the consignment note, but the reference, in article 5, paragraph 1, to its issuance in three "original copies signed by the sender and by the carrier" clearly suggests that the Convention contemplates the issuance of the consignment note as a paper document. This is even more evident in the light of the last sentence of article 5, paragraph 1, which provides that "the first copy [of the consignment note] shall be handed to the sender, the second shall accompany the goods and the third shall be retained by the carrier".

89. As pointed out in the CEFACT survey, there are some potential problems if a paper document is not produced and automation is permitted only to the extent of allowing signatures to be printed or stamped and then only if the law of the country in which the note is produced so permits (art. 5, para. 1) (TRADE/CEFACT/1999/CRP.7, para. 2.10.3).

a. The consignment note as proof of the contract of carriage

90. In its most basic function, the consignment note is a document that proves the existence of the contract of carriage and its terms. Indeed, article 9, paragraph 1, provides that "the consignment note shall be prima facie evidence of the making of the contract of carriage, the conditions of the contract and the receipt of the goods by the carrier". This evidentiary function could arguably be fulfilled by data messages, provided that their functional equivalence to paper-based consignment notes is legally recognized. However, where no such general recognition exists, courts might find that the exchange of data messages is not equivalent to the making out of a "consignment note" under the Convention.

91. The consequences of such a finding for the parties may be significant. Under article 6 of the Convention, a consignment note is required, inter alia, to incorporate a statement that the Convention is applicable, to establish the applicable time limit for delivery and to make declarations of value or special interest in delivery. The absence of the statement on the applicability of the Convention can lead to unlimited liability for the carrier. The absence of the other matters referred to above may be fatal to any claim made by a claimant, in particular if it is not made against the contracting carrier but against a subcontractor or "successive CMR carrier". Finally, subcontractors or "successive carriers" only become obligated under the Convention if they have taken over both the goods and a physical CMR note (art. 34). The CEFACT survey points out that some courts have been

very strict in their interpretation of this provision so as to bar certain claims under CMR terms against a sub-contractor who was not handed over the CMR note (art. 34.).

b. The consignment note and disposal of the goods

92. Unlike other transport documents, such as the maritime bill of lading, the consignment note is not a document of title to the goods in transit. Nevertheless, possession of the consignment note has some significant consequences with regard to the right of disposal of the goods, as provided in article 12 of the Convention. For instance, while the sender has the right to dispose of the goods in transit (para. 1), such right ceases to exist, inter alia, "when the second copy of the consignment note is handed to the consignee", from which time onwards "the carrier shall obey the orders of the consignee".

93. Furthermore, pursuant to article 12, paragraph 5, in order to exercise that right, the sender or, as appropriate, the consignee must produce the first copy of the consignment note on which the new instructions to the carrier have been entered. The production of the consignment note has important consequences for the liability regime of the carrier, since paragraph 7 of the same article provides that "a carrier who has not carried out the instructions given under the conditions provided for in this article, or who has carried them out without requiring the first copy of the consignment note to be produced, shall be liable to the person entitled to make a claim for any loss or damage caused thereby".

94. Replacing paper-based consignment notes with data messages might conceivably be simpler than the development of purely electronic substitutes to documents of title. Nevertheless, an appropriate legal framework would seem to require more than simply recognizing the validity of data messages as substitutes for traditional consignment notes. Authentication methods and conditions for functional equivalence of data messages to "original" consignment notes would also need to be considered.

(ii) Provisions that contemplate notices or declarations that may be exchanged by the parties

95. Possible difficulties in the use of electronic communications may result from various provisions of the Convention that require certain notices to be given by the parties under specified circumstances. Article 20, paragraph 2, for example, allows the person entitled to receive compensation in case of failed delivery of the goods to "request in writing that he shall be notified immediately should the goods be recovered in the course of the year following the payment of compensation". In that case, the person "shall be given a written acknowledgement of such request".

96. Other writing requirements relate to reservations providing for compensation payment for delay in delivery of goods (art. 30, para. 3); notices of claims and their effect on the running of the limitation period; and the carrier's notice of rejection of claims (in both cases, art. 32, para. 2).

97. The possible obstacles to electronic commerce in those provisions are essentially of the same nature as in connection with similar provisions in the Convention on the Limitation Period in the International Sale of Goods (see paras. 5-20 above).

(b) International initiatives to revise the Convention

98. The CEFACT survey reports that the International Road Transport Union has carried out some detailed and authoritative work exploring ways of remedying the difficulties outlined above. That work included the preparation of a discussion document entitled "Electronic transmission of information in the context of a contract for carriage of goods by road under the CMR Convention", of 2 February 1994, and a model communication agreement between commercial partners in the context of international carriage by road, of 8 February 1994. The CEFACT survey summarizes the conclusions of the studies done by the International Road Transport Union as follows: (a) the Union believes that virtually all problems posed by the Convention itself can be remedied by contractual clarification, but recognizes that electronic data interchange can only readily be used when all parties to the process of carriage by road are connected by electronic data interchange (still very rarely the case); and (b) a revision of the Convention itself would not be practical, although the Union believes that a protocol dealing solely with the problem of electronic transmission of commercial documents could readily be devised.

99. Those considerations seem to have found echo within the ECE Working Party on Road Transport. At its ninety-second session, held in Geneva from 19 to

21 October 1998, the Working Party was informed that the ECE secretariat had contacted the Legal Rapporteurs Group of CEFACT, regarding the integration of electronic data interchange into the Convention. The Legal Rapporteurs Group had recommended the drawing up of a protocol to the CMR Convention rather than a revision and suggested that the draft Model Law developed by the United Nations Commission on International Trade Law might provide some of the elements required in such a protocol. The Working Party agreed that developing a protocol to the Convention to incorporate electronic commerce issues was a complex issue that would require further analysis by experts on electronic data interchange, transport and private law and asked the Secretariat to contact Unidroit for its views on the matter (see TRANS/SC.1/R.363, paras. 41 and 42).

100. An initial memorandum entitled "Consideration of the development of a Protocol to [Convention on] the Contract for the International Carriage of Goods by Road (CMR)" was subsequently prepared by Jacques Putzeys, a member of the Governing Council of Unidroit, and submitted on 31 August 2000 for consideration by the Working Party. In that memorandum, Mr. Putzeys submitted the following provisional conclusions (TRANS/SC.1/2000/9, pp. 7 and 8):

(a) A first analysis leads to the conclusion that, if electronic data interchange and "electronic" consignment notes were to be accepted, no major legal difficulties would result from the linking of the means of proof to the CMR paper-based consignment note. This conclusion is based on a teleological interpretation of the CMR ("functional equivalence"), which, however, the case law of certain countries would admit with difficulty;

(b) The same conclusion may be reached in relation to the other modes of transmission, such as telecopy, telegram and telex. Certain national legislations have incorporated these instruments into their provisions on evidence;

(c) Legal security would consequently require the possibilities analysed above to be based, in legal terms, on a substantive uniform law;

(d) It is currently unanimously admitted that only an additional protocol would constitute an appropriate instrument. A protocol modifying the Convention would involve serious difficulties in consideration of the system of connecting factors of the CMR Convention (place of take-over or designated place for delivery). An additional protocol could moderate that criterion, for example, by not having it apply unless the parties to the contract of carriage had concluded a communication agreement;

(e) Following the example of existing conventions (the United Nations Convention on Contracts for the International Sale of Goods, the Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention) and the Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway), the CMR protocol should be limited to what has been analysed and should not involve more than a provision permitting the functional equivalence of electronic data interchange (possibly also of other modes of transmission) to the paper-based consignment note;

(f) If the present situation of the road transport enterprises deriving from the CMR Convention is considered, it may be observed that in practice electronic data interchange is already used extensively. It is therefore urgent to fill the legal void.

101. The Working Party considered that memorandum at its ninety-fourth session, held in Geneva from 14 to 16 November 2000. The Working Party thanked Mr. Putzeys for his work and asked him if he would be in a position to prepare a draft text of the protocol. Mr. Putzeys offered to prepare an informal text of the protocol and to submit it to the Secretariat in early 2001. He cautioned that the proposal would only become formal after it had been adopted by the Governing Council of Unidroit, which would meet in September 2001, but that it could still be considered by the Working Party at its ninety-fifth session, in 2001 (TRANS/SC.1/367, paras. 51 and 52).

102. An initial draft protocol was subsequently prepared by Unidroit and submitted informally for the consideration of the Working Party on 1 August 2001, pending adoption by the Governing Council of Unidroit. The text of the draft protocol reads as follows:

"*Draft EDI Protocol to the CMR*

"[…]

"being parties to the Convention on the Contract for the International Carriage of Goods by Road (CMR), done at Geneva on 19 May 1956,

"[…]

"Article 1. For the purposes of the present Protocol 'Convention' means the Convention on the Contract for the International Carriage of Goods by Road (CMR).

"Article 2. At the end of article 5 of the Convention, the following paragraph is added:

'3. Unless otherwise agreed between the parties concerned, the consignment note may be made out by all other means of transmission of information, by electronic or similar means of communication, including, but not limited to, telegram, facsimile, telex, electronic mail or electronic data interchange (EDI),

'- [provided the information is accessible so as to be usable for subsequent reference.]

'- [The procedure used for the registration and treatment of data must be equivalent from the functional point of view, particularly so far as concerns the evidential value of the consignment note represented by those data.]

'- [If such other means are used, the carrier shall, if so requested by the consignor, deliver to the consignor a cargo receipt permitting identification of the consignment and access to the information contained in the record preserved by such other means.]'"

103. The Working Party considered the draft protocol at its ninety-fifth session, held in Geneva from 16 to 19 November 2001. The Working Party's deliberations on that matter are summarized as follows in the report on the work of that session (TRANS/SC.1/369, paras. 44-45 (unofficial translation from the French)):

"44. The Working Party thanked Professor Putzeys for having prepared a draft protocol to the CMR Convention to allow the use of electronic data interchange (EDI) in lieu of paper-based consignment notes (TRANS/SC.1/2001/7). The draft text, which presents three possible variants to those already incorporated in existing conventions, received the official approval of the Governing Council of Unidroit at its meeting in September 2001 (TRANS/SC.1/2001/7/Add.1).

"45. As the project caused varying reactions following questions raised by the German delegation, the Working Party felt that the topic needed to be considered further. The Working Party therefore requested the Secretariat to solicit in writing, by means of a questionnaire, the views of the contracting parties to the Convention with regard to the concrete action to be taken in respect of the draft protocol, in particular as regards the best solution to implement in the context of the CMR Convention. It also asked the Secretariat to prepare a summary of the replies. Professor Putzeys offered to assist the Secretariat in this task. At a third stage, an informal drafting group would be convened to prepare a draft protocol with a view to its adoption."

Conclusion

104. In view of the nature of the transport documentation regime established by the CMR Convention, which may require particular solutions so as to allow for the use of data messages in connection with international road carriage, the Working Group may wish to request the Secretariat to continue monitoring the current efforts being undertaken under the auspices of ECE and report on their progress at a later stage.

12. Convention on the Taxation of Road Vehicles Engaged in International Goods Transport (Geneva, 14 December 1956)

Status: Entered into force on 29 August 1962 (5 signatories; 19 parties).

Source: United Nations, *Treaty Series*, vol. 436, No. 6292, p. 115.

Comments

105. The purpose of the Convention is to exempt from taxes and charges vehicles that are registered in the

territory of one of the contracting parties and are temporarily imported in the course of international goods transport into the territory of another contracting party, under certain stipulated conditions. In its review of the Convention the Secretariat has not found any provisions that might be directly relevant to electronic commerce.

13. Convention on the Taxation of Road Vehicles Engaged in International Passenger Transport (Geneva, 14 December 1956)

Status: Entered into force on 29 August 1962 (6 signatories; 18 parties).

Source: United Nations, *Treaty Series*, vol. 436, No. 6293, p. 131.

Comments

106. The purpose of the Convention is to facilitate the taxation of road vehicles transporting persons and their baggage between countries for remuneration or other considerations. In its review of the Convention the Secretariat has not found any provisions that might be directly relevant to electronic commerce.

14. European Agreement concerning the International Carriage of Dangerous Goods by Road (Geneva, 30 September 1957) and (a) Protocol amending article 14, paragraph 3; and (b) Protocol amending article 1 (a), article 14, paragraph 1, and article 14, paragraph 3

Status: Entered into force on 29 January 1968 (Convention: 9 signatories; 38 parties; Protocol (a): 20 parties; Protocol (b): 24 parties).

Source: United Nations, *Treaty Series*, vol. 619, No. 8940, p. 77.

Comments

107. The purpose of the ADR Agreement is to increase the safety of international transport of dangerous goods by road, with the use of prohibitive or regulatory measures. In its review of the Convention the Secretariat has not found any provisions that might be directly relevant to electronic commerce.

22. Agreement on the International Carriage of Perishable Foodstuffs and on the Special Equipment to be used for such Carriage (Geneva, 1 September 1970)

Status: Entered into force on 21 November 1976 (7 signatories; 38 parties)

Source: United Nations, *Treaty Series*, vol. 1028, No. 15121, p. 121.

Comments

108. The purpose of the ATP Agreement is to improve the conditions of preservation of the quality of perishable foodstuffs during their carriage, in particular in international trade by the use of special transport equipment and applicable temperatures during carriage. An earlier agreement on the same subject (the Agreement on Special Equipment for the Transport of Perishable Foodstuffs and on the Use of such Equipment for the International Transport of some of those Foodstuffs), concluded in Geneva on 15 January 1962 (E/ECE/456), has not entered into force.

109. The Agreement facilitates international trade in perishable goods by introducing common standards for the inspection, testing and approval of transport equipment. Once a certificate of inspection is issued by the competent authorities of a contracting party, in accordance with the standards set forth in the annex to the Agreement, the validity of such a certificate must be accepted by authorities of the other contracting parties.

Conclusions

110. Despite their significance for international trade, the substantive provisions of the Convention are essentially of a health and sanitary nature. They are addressed to States and do not establish rules directly relevant for private law transactions. Furthermore, the extent to which electronic communications may be substituted for paper-based documents for the purposes of the Convention is largely dependent upon the

capability and readiness of public authorities in the contracting parties to the Convention to process such documents in electronic form. The Working Group may thus wish to consider that no action is required in respect of the Convention.

21. European Agreement concerning the Work of Crews of Vehicles Engaged in International Road Transport (Geneva, 1 July 1970)

Status: Entered into force on 5 January 1976 (13 signatories; 41 parties).

Source: United Nations, *Treaty Series*, vol. 993, No. 14533, p. 143.

Comments

111. The purpose of the AETR Agreement is to increase the safety of road traffic by ensuring that crew members engaged in international road transport observe the conditions imposed with regard to daily rest periods, driving periods, manning and individual control books. An earlier agreement with the same title (E/ECE/457), which was concluded in Geneva on 19 January 1962, has not entered into force.

Conclusions

112. The provisions of the Agreement deal essentially with social matters and issues related to work safety and do not establish rules directly relevant for private law transactions. Furthermore, the extent to which electronic communications may be substituted for the records required in the Convention is largely dependent upon the capability and readiness of public authorities in the contracting parties to the Convention to process such documents in electronic form. The Working Group may thus wish to consider that no action is required in respect of the Agreement.

23. European Agreement supplementing the Convention on Road Traffic opened for Signature at Vienna on 8 November 1968 (Geneva, 1 May 1971)

Status: Entered into force on 7 June 1979 (12 signatories; 28 parties)

Source: United Nations, *Treaty Series*, vol. 1137, No. 17847, p. 369.

Comments

113. The purpose of the Agreement is to harmonize rules governing road traffic in Europe, ensure their compliance in order to facilitate international road traffic and increase road safety. In its review of the Agreement the Secretariat has not identified any provisions that might be of direct relevance for electronic commerce.

26. Convention on the Contract for the International Carriage of Passengers and Luggage by Road (Geneva, 1 March 1973) and Protocol thereto

Status: Entered into force on 2 April 1994 (2 signatories; 6 parties).

Source: United Nations, *Treaty Series*, vol. 1774, No. 30887, p. 109.

Comments

114. The purpose of the CVR Convention is to standardize the conditions for the contract for the international carriage of passengers and luggage by road. The provisions that may give rise to legal difficulties in connection with electronic communications are essentially those provisions which relate to transport documents.

115. The Convention contains a series of provisions dealing with transport documents. In respect of carriage of passengers, article 5 of the Convention requires the issuance by the carrier of “an individual or a collective ticket” even though the absence of such a ticket does not affect the existence or validity of the contract of carriage. In respect of luggage, article 8 requires the issuance of a “luggage registration voucher” by the carrier. None of those provisions expressly requires those documents to be printed on paper. However, the transferability of the passenger ticket (art. 7) and the requirement of presentation of the luggage registration voucher for delivery of luggage (art. 10, para. 1) seem to presuppose the issuance of those documents in tangible form.

116. In addition to those provisions, article 22, paragraph 3, contains two writing requirements in connection with the limitation period for actions under the Convention: the limitation period is suspended by a "written claim" until the date the carrier rejects the claim "by notification in writing" and returns any documents handed to him in support of the claim.

Conclusions

117. In view of the particular nature of the issues raised by electronic substitutes for transferable instruments, it appears that a comprehensive new legal framework might be required in order to allow for the international use of data messages in lieu of the paper-based transport documents envisaged by the Convention. The Secretariat submits that developing such a comprehensive legal framework might go beyond the scope of the Working Group's efforts to remove obstacles to electronic commerce in existing international trade-related instruments. The Secretariat further submits that an analysis of the specific requirements for such a comprehensive legal framework might best be undertaken in the course of the Working Group's consideration of legal issues related to the transfer of rights, in particular, rights in tangible goods, by electronic means (see A/CN.9/484, paras. 87-93).[a]

118. As regards the writing requirements in the Convention, the Working Group may wish to consider whether they might not be addressed in the context of its deliberations on the development of an international instrument dealing with some issues of electronic contracting (see A/CN.9/WG.IV/WP.95).

C. Transport by rail

2. International Convention to Facilitate the Crossing of Frontiers for Goods Carried by Rail (Geneva, 10 January 1952)

Status: Entered into force on 1 April 1953 (7 signatories; 10 parties).

Source: United Nations, *Treaty Series*, vol. 163, No. 2139, p. 27 and vol. 328, p. 319.

Comments

119. The purpose of the Convention is to ensure an effective and efficient examination at designated stations for goods carried by rail crossing frontiers. In its review of the Convention the Secretariat has not found any provisions that might be directly relevant to electronic commerce.

D. Water transport

1. Convention relating to the Limitation of the Liability of Owners of Inland Navigation Vessels and Protocol thereto (Geneva, 1 March 1973)

Status: Not yet in force (Convention: 2 signatories; 1 party; Protocol: 1 party)

Source: ECE/TRANS/3.

Comments

120. The purpose of the CLN Convention is to enable owners and crew members of inland navigation vessels to limit their liability, either contractually or extra-contractually, by constituting a limitation fund in accordance with the provisions of the Convention. The Secretariat has reviewed the Convention and has not found any provisions that might be directly relevant to electronic commerce.

3. United Nations Convention on the Carriage of Goods by Sea (Hamburg, 31 March 1978)

Status: Entered into force on 1 November 1992 (28 signatories; 28 parties).

Source: United Nations, *Treaty Series*, vol. 1695, No. 29215, p. 3.

Comments

121. The purpose of the Convention is to establish uniform rules on rights and liabilities of the carrier and shipper relating to the carriage of goods by sea. Provisions that might pose obstacles to the use of electronic communications may be grouped under three basic categories: (a) provisions concerning the contract

of carriage; (b) provisions that expressly contemplate written notices or communications, including definitions of "writing"; and (c) provisions that refer to an existing undertaking or agreement between the parties.

(a) Provisions concerning the contract of carriage

122. The Convention governs the rights and obligations of the parties to a contract of carriage. While the only instrument of contract of carriage expressly mentioned in the Convention is the bill of lading, the Convention also contemplates the possibility that a contract of carriage may be entered into by using a non-negotiable transport document.

(i) Provisions concerning the bill of lading

123. Bills of lading are regarded as documents of title under most legal systems. Rights in goods represented by documents of title are typically conditioned by the physical possession of an original paper document (the bill of lading, warehouse receipt or other similar document). As such, the legal regime governing those instruments typically presupposes the existence of an instrument in tangible documentary form that is capable of being transferred by endorsement.

124. In an earlier note, the Secretariat analysed various legal issues that arise in connection with developing an electronic equivalent to paper-based documents of title and other negotiable instruments and pointed out the complexities involved in developing an electronic equivalent to paper-based bills of lading (A/CN.9/WG.IV/WP.90, in particular paras. 35-37, 75-78 and 95-106). After consideration of that note and of the various views that were expressed in connection therewith, it was generally agreed within the Working Group that further study was needed in order for it to define in more precise terms the scope of future work in the area. The Working Group therefore agreed to recommend to the Commission that the Secretariat be requested to study further the issues related to transfer of rights, in particular rights in tangible goods, by electronic means and mechanisms for publicizing and keeping records of acts of transfer or creation of security interests in such goods. The study should examine the extent to which electronic systems for transferring rights in goods could affect the rights of third parties. The study should also consider the interface between electronic substitutes for documents of title and financial documentation used in international trade, by giving attention to efforts currently under way to replace paper-based documents, such as letters of credit and bank guarantees, with electronic messages (A/CN.9/484, para. 93). Those recommendations were endorsed by the Commission at its thirty-fourth session, in 2001.[b]

(ii) Provisions concerning other instruments of the contract of carriage

125. Unlike the International Convention for the Unification of Certain Rules of Lading (the Hague Rules) of 1924, which apply only when a bill of lading is issued by the carrier, the Hamburg Rules govern the rights and obligations of the parties to a contract of carriage regardless of whether or not a bill of lading has been issued. This is becoming increasingly important as more and more goods are carried under non-negotiable transport documents, such as the sea waybill, rather than under bills of lading.

126. As noted in an earlier note prepared by the Secretariat, there is undoubtedly a trend towards an increased use of sea waybills as substitutes for traditional bills of lading. A sea waybill is a non-negotiable document that constitutes evidence of the contract of carriage and of the receipt of the goods by the carrier. It is not a document of title and it cannot be used to transfer ownership of the goods. A sea waybill need not be presented for taking delivery of the goods; the carrier tenders delivery to the named consignee who need only prove his identity (A/CN.9/WG.IV/WP.69, paras. 46-48).

127. There are no specific form requirements for instruments of contracts of carriage other than the bill of lading. Nevertheless, the reference, in article 18, to the issuance of a "document" other than a bill of lading to evidence the receipt of the goods to be carried suggests that the Convention contemplates the use of paper-based documents.

128. Given their non-negotiable nature, it is conceivably simpler to develop electronic equivalents to sea waybills than electronic alternatives to paper-based bills of lading. The issues to be considered in that connection are essentially the same as for the replacement of other contractual documents with electronic equivalents. Those issues include essentially issues dealt with in the UNCITRAL Model Law on Electronic Signatures, such as the following: recognition of the legal validity of electronic

communications or records purporting to constitute a maritime transport document; legal recognition of electronic signatures and electronic equivalents to "original" paper documents. Nevertheless, much the same way as in the case of consignment notes for road transport (see paras. 92-94), an appropriate legal framework would seem to require more than simply recognizing the validity of data messages as substitutes for traditional sea waybills. Authentication methods and conditions for functional equivalence of data messages to "original" sea waybills would also need to be considered.

129. In that connection, the Working Group may wish to note that the Commission, at its thirty-fourth session, decided to establish a working group to consider various issues on maritime law.[c] Those issues include questions such as the functioning of bills of lading and sea waybills, the relation of those transport documents to the rights and obligations between the seller and the buyer of the goods and the legal position of the entities that provide financing to a party to the contract of carriage. In cooperation with the Comité Maritime International (CMI), the Secretariat has prepared a working paper containing drafts of possible solutions for a future legislative instrument, with alternatives and comments, which include provisions dealing with electronic equivalents to paper-based transport documents (A/CN.9/WG.III/WP.21 and Add.1). Working Group III (Transport Law) is expected to consider that working paper at its ninth session, to be held in New York from 15 to 26 April 2002).

(b) Provisions that expressly contemplate written notices or communications, including definitions of "writing"

130. Various provisions in the Convention refer to communications that need to be made "in writing", which is defined in article 1, paragraph 8, as including "inter alia, telegram and telex".

131. According to article 10, paragraph 3, any special agreement under which the carrier assumes obligations not imposed by this Convention or waives a right conferred by this Convention "affects the actual carrier only if agreed to by him expressly and in writing". Article 19, paragraphs 1 and 2, require notice "in writing" of loss or damage to the goods not later than the working day after the day when the goods were handed over to the consignee, otherwise such handing over would constitute prima facie evidence of the delivery by the carrier of the goods as described in the document of transport. Paragraph 7 contains a similar provision in respect of notices of loss or damage that may be given by the carrier or actual carrier to the shipper.

(c) Provisions that refer to an existing undertaking or agreement between the parties.

132. A few provisions in the Convention refer to existing undertakings or agreements between the parties without specifying the form that they need to take. According to article 9, paragraph 1, the carrier is entitled to carry the goods on deck "only if such carriage is in accordance with an agreement with the shipper or with the usage of the particular trade or is required by statutory rules or regulations". Pursuant to paragraph 2, in the absence of a statement to that effect in the bill of lading or other document evidencing the contract of carriage the carrier has the burden of proving that an agreement for carriage on deck has been entered into.

Conclusions

133. As regards the issues raised by electronic substitutes for bills of lading (see paras. 120 and 121) and other transport documents (see paras. 122-126), the Secretariat submits that the consideration of the particular issues involved might go beyond the scope of the Working Group's efforts to remove obstacles to electronic commerce in existing international trade-related instruments. The Working Group may wish, at the present stage, to request that the Secretariat inform the Working Group on the progress of the work of Working Group III (Transport Law). The Working Group may wish also to consider formulating comments on that work at an appropriate stage.

134. As regards the other issues related to electronic commerce under the Convention (see paras. 127-129), the Working Group may wish to consider whether they might not be addressed in the context of its deliberations on the development of an international instrument dealing with some issues of electronic contracting (see A/CN.9/WG.IV/WP.95).

4. International Convention on Maritime Liens and Mortgages (Geneva, 6 May 1993)

Status: Not yet in force (11 signatories; 5 parties).

Source: A/CONF.162/7.

Comments

135. The purpose of the Convention is to improve the conditions for ship financing and the development of national merchant fleets and to achieve international uniformity in the field of maritime liens and mortgages. The provisions of relevance for the use of electronic communications may be grouped under essentially two categories: (a) provisions relating to the registration of maritime liens and mortgages; and (b) provisions that expressly contemplate written notices or communications.

(a) Provisions relating to the registration of maritime liens and mortgages

136. The Convention envisages the establishment by the contracting parties of a registration system for mortgages, *hypothèques* and registrable charges of the same nature to be effected in accordance with the law of the State in which the vessel is registered. Beyond acts related to the registration procedures, the Convention contains provisions on various related matters, such as priority of maritime liens and provisions governing the issuance of various certificates by the competent authorities.

137. An earlier note by the Secretariat points out that, in addition to general issues related to the fulfilment of legal "writing", "signature" and "original" requirements, the establishment of electronic equivalents to paper-based registration systems raises a number of particular problems. They include the satisfaction of legal requirements for record-keeping, the adequacy of certification and authentication methods, the possible need for specific legislative authority to operate electronic registration systems, the allocation of liability for erroneous messages, communication failures and system breakdowns, the incorporation of general terms and conditions and the safeguarding of privacy (A/CN.9/WG.IV/WP.90, para. 31).

138. Possible legal obstacles arising out of legal requirements for record-keeping might be removed by means of legislation implementing the principles set forth in articles 8 and 10 of the UNCITRAL Model Law on Electronic Commerce. The incorporation of terms and conditions is addressed in article 5 bis of the Model Law. However, the Model Law does not address other issues specifically relevant to the functioning of electronic registration systems (A/CN.9/WG.IV/WP.90, para. 32).

(b) Provisions that expressly contemplate written notices or communications

139. Article 11 of the Convention provides that, prior to a forced sale of a vessel in a State party, the competent authority in such State must ensure that notices are given to various authorities and persons. Although paragraph 3 of the same article requires such a notice to be "in writing", the same provision expressly recognizes that the notice may be "either given by registered mail, or given by any electronic or other appropriate means which provide confirmation of receipt".

Conclusions

140. In view of the particular nature of the issues raised by electronic registry systems, the Secretariat submits that a possible analysis of the specific requirements for the functioning of electronic registration systems under the Convention might best be undertaken in the course of the Working Group's consideration of legal issues related to the transfer of rights, in particular, rights in tangible goods, by electronic means (see A/CN.9/484, paras. 87-93).[a]

E. Multimodal transport

1. United Nations Convention on International Multimodal Transport of Goods (Geneva, 24 May 1980)

Status: Not yet in force (6 signatories; 10 parties).

Source: TD/MT/CONF/16.

Comments

141. The purpose of the Convention is to enhance the development and effectiveness of international transport of goods by resolving legal uncertainties and to set

levels of compensation for loss of or damage and delay to goods in transit.

142. Article 5, paragraph 1, of the Convention requires the multimodal transport operator to issue a multimodal transport document, which, at the option of the consignor, is in either negotiable or non-negotiable form. Paragraph 3 of that article provides that the signature on the document may be in handwriting, printed in facsimile, perforated, stamped, in symbols "or made by any other mechanical or electronic means, if not inconsistent with the law of the country where the multimodal transport document is issued". The document itself need not be printed on paper, as clearly stated in paragraph 4 of the same article. If the consignor so agrees, a non-negotiable multimodal transport document may be issued by making use of any mechanical "or other means preserving a record of the particulars stated in article 8 to be contained in the multimodal transport document". In such a case the multimodal transport operator, after having taken the goods in charge, must deliver to the consignor "a readable document containing all the particulars so recorded, and such document shall for the purposes of the provisions of this Convention be deemed to be a multimodal transport document". While the Convention does not provide a definition of "document", it appears from the context of article 5 that the notion of "document" may be broader than the rather narrow definition of "writing" in article 1, paragraph 10, of the Convention, which means "inter alia, telegram or telex".

143. The form requirements for the multimodal transport document are intended to allow for the use of electronic means of communication. However, it seems doubtful that aligning form requirements with modern communication methods might be sufficient. Negotiable transport documents would seem to give rise, mutatis mutandis, to the same issues that arise in connection with maritime bills of lading, while the non-negotiable pose similar questions to those raised by equivalent maritime transport documents (see paras. 123-129).

144. In addition to questions immediately related to the types of transport document governed by the Convention, the Convention contains other provisions that might create obstacles to the use of electronic communications. Those provisions relate essentially to written notices or communications (in particular notices of loss of or damage to goods) and to an existing undertaking or agreement between the parties. The issues of electronic commerce raised by those provisions are very similar in nature to those raised by the corresponding provisions under the United Nations Convention on the Carriage of Goods by Sea (see paras. 130-132).

Conclusions

145. As regards the issues raised by electronic substitutes for mutimodal transport documents (see paras. 142 and 143), the Secretariat submits that the consideration of the particular issues involved might go beyond the scope of the Working Group's efforts to remove obstacles to electronic commerce in existing international trade-related instruments. The Working Group may wish to request the Secretariat to consult the United Nations Conference on Trade and Development and inform the Working Group, at an appropriate stage, on any work that might be undertaken in connection with the matters discussed above.

146. As regards the other issues related to electronic commerce under the Convention (see para. 144), the Working Group may wish to consider whether they might not be addressed in the context of its deliberations on the development of an international instrument dealing with some issues of electronic contracting (see A/CN.9/WG.IV/WP.95).

2. European Agreement on Important International Combined Transport Lines and Related Installations and Protocol thereto (Geneva, 1 February 1991)

Status: Entered into force on 20 October 1993 (Convention: 19 signatories; 23 parties; Protocol: 15 signatories; 7 parties).

Source: United Nations, *Treaty Series*, vol. 1746, No. 30382, p. 3.

Comments

147. The purpose of the AGTC Convention is to facilitate the operation of combined transport services and infrastructures necessary for their efficient

operation in Europe. In its review of the Convention the Secretariat has not found any provisions that might be directly relevant to electronic commerce.

III. Commercial arbitration

1. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958)

Status: Entered into force on 7 June 1959 (24 signatories; 128 parties).

Source: United Nations, *Treaty Series*, vol. 330, No. 4739, p. 3.

Comments

148. The purpose of the Convention is to establish uniform rules on the recognition and enforcement of foreign arbitral awards that would bring confidence in the efficacy of the arbitration process as a means of dispute resolution across state boundaries. Potentially problematic provisions belong essentially to the three categories indicated below.

(a) Provisions requiring written form of the arbitration agreement

149. Article II, paragraph 1, requires the contracting States to recognize "an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship". The expression "agreement in writing" is defined in paragraph 2 of the same article so as to include "an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams".

150. As indicated in an earlier study by the Secretariat, it is generally accepted that the expression in article II, paragraph 2, "contained in an exchange of letters or telegrams" should be interpreted broadly to include other means of communication, in particular telex (to which facsimile could nowadays be added). The same teleological interpretation could be extended to cover electronic commerce, a result that would be in line with the decision taken by the Commission when it adopted the UNCITRAL Model Law on Electronic Commerce in 1996 (see A/CN.9/460, para. 23). The problem arises from the combination of the question of form and the way the arbitration agreement comes about (i.e. its formation), expressed by the expression "exchange of letters or telegrams", which lends itself to an overly literal interpretation in the sense of a mutual exchange of writings.

151. Pursuant to the mandate received from the Commission at its thirty-second session, in 1999, the Working Group on Arbitration is currently considering, among other topics on its agenda, proposals for clarifying the meaning of article II of the Convention. The current status of the Working Group's deliberations is reflected in the report of the Working Group on the work of its thirty-third session (see A/CN.9/485, paras. 60-77) and the working paper prepared for the thirty-sixth session (A/CN.9/WG.II/WP.118).

(b) Provisions requiring the submission of "original" documents

152. Difficulties for the use of electronic communications may result, in particular, from the requirement, in article IV, paragraph 1, that, in order to obtain recognition and enforcement of an arbitral award, the moving party must supply: "(a) the duly authenticated original award or a duly certified copy thereof"; and "(b) the original agreement referred to in article II or a duly certified copy thereof". In view of the growing interest in online dispute settlement mechanisms, subparagraph (a) of this provision may be a source of legal uncertainty, in particular in States that have not enacted legislation implementing the Model Law on Electronic Commerce, in particular its article 8, or do not otherwise provide for the functional equivalence between data messages and paper-based originals.

(c) Provisions that contemplate notices or declarations that may be exchanged by the parties

153. Article V, paragraph 1 (b), provides that recognition and enforcement of an arbitral award may be refused if there is proof, inter alia, "that the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or the arbitration proceedings or was otherwise unable to present his case".

Conclusions

154. The Working Group may wish to take note of the work being undertaken by Working Group II (Arbitration) in connection with the written form of the arbitration agreement under article II of the Convention and related issues. The Working Group may wish to note that those issues will next be considered by Working Group II (Arbitration) at its thirty-sixth session, to be held in New York from 4 to 8 March 2002. The Working Group may also wish to request the Secretariat to inform the Working Group on the progress of that work with a view to formulating comments thereon at an appropriate stage.

2. European Convention on International Commercial Arbitration (Geneva, 21 April 1961)

Status: Entered into force on 7 January 1964 (16 signatories; 28 parties).

Source: United Nations, *Treaty Series*, vol. 484, No. 7041, p. 349.

Comments

155. The purpose of the Convention is to promote the recognition and enforcement of the arbitration process as a means of dispute resolution between physical and legal persons in European countries. Although the Convention does not specifically require that an arbitration agreement needs to be in writing or that an arbitral award needs to be contained in a printed document, the issues it raises are essentially the same as those raised by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (see paras. 148-154).

Conclusions

156. The Working Group may wish to take note of the work being undertaken by Working Group II (Arbitration) in connection with the written form of the arbitration agreement under article II of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and related issues. The Working Group may wish to note that those issues will next be considered by Working Group II (Arbitration) at its thirty-sixth session, to be held in New York from 4 to 8 March 2002. The Working Group may also wish to request that the Secretariat inform the Working Group on the progress of that work with a view to formulating comments thereon at an appropriate stage.

Notes

[a] See also *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), para. 291.

[b] Ibid., paras. 292 and 293.

[c] Ibid., para. 345.