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

### **Compilation of comments by Governments and international organizations**

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## I. Introduction

1. The Working Group on Electronic Commerce considered proposals for removing obstacles to electronic commerce in existing international conventions at its thirty-eighth session, in March 2001, on the basis of a note by the Secretariat (A/CN.9/WG.IV/WP.89). The Working Group agreed to recommend to the Commission the preparation of an appropriate international instrument or instruments to remove those legal barriers to the use of electronic commerce that might result from international trade law instruments. The Working Group also agreed to recommend to the Commission that the Secretariat should carry out a comprehensive survey of possible legal barriers to the development of electronic commerce in international instruments. The Commission endorsed that recommendation, along with other recommendations for future work, at its thirty-fourth session, in 2001.<sup>1</sup>
2. The Secretariat began the survey by identifying and reviewing trade-relevant instruments from among the large number of multilateral treaties that were deposited with the Secretary-General. The Secretariat identified 33 treaties as being potentially relevant for the survey and analysed possible issues that might arise from the use of electronic means of communications under those treaties. The preliminary conclusions reached by the Secretariat in relation to those treaties are set out in a note by the Secretariat (A/CN.9/WG.IV/WP.94) that was submitted to the Working Group at its thirty-ninth session, in March 2002.
3. At that session, the Working Group took note of the progress that had been made by the Secretariat in connection with the survey but did not have sufficient time to consider the Secretariat's preliminary conclusions. The Working Group requested the Secretariat to seek the views of member and observer States on the survey and the preliminary conclusions indicated therein and to prepare a report compiling such comments for consideration by the Working Group at a later stage. The Working Group further requested the Secretariat to seek the views of other international organizations, including organizations of the United Nations system and other intergovernmental organizations, as to whether there were international trade instruments in respect of which those organizations or their member States acted as depositaries that those organizations would wish to be included in the survey being conducted by the Secretariat.
4. By note verbale of 11 April 2002 and letters of 22 and 29 April 2002, the Secretary-General forwarded the survey, which appears in the annex to document A/CN.9/WG.IV/WP.94, to States and to 13 intergovernmental and 12 international non-governmental organizations that are invited to attend the meetings of the Commission and its working groups as observers. The Secretariat requested States and those organizations to review the survey and submit their comments thereon for consideration by the Working Group. The present document reproduces the first comments received by the Secretariat. Comments received by the Secretariat after the issuance of the present document will be published as addenda thereto in the order in which they are received. Furthermore, with a view to ensuring the broadest possible basis of consultations, the Secretariat continues to seek the views of other intergovernmental and international non-governmental organizations beyond the group of organizations initially addressed by the Secretariat.

## II. Compilation of comments

### A. States

#### 1. Austria

[Original: English]

[19 June 2002]

1. Austria shares the view that the issues related to electronic contracting identified in the instruments analysed, as far as they do not go beyond the scope of the Working Group's efforts, can best be addressed in the context of its deliberations on the development of an international instrument dealing with electronic contracting and of its consideration of legal issues related to the transfer of rights.

2. As a result, there seems to be no need for an "omnibus convention", which would address these issues specifically for adapting the instruments to an electronic environment.

#### 2. Italy

[Original: English]

[1 July 2002]

1. The Italian delegation wishes first of all to express its appreciation to the Secretariat for having issued document A/CN.9/WG.IV/WP.94, with such a high-quality survey of international legal instruments annexed to it. In making the comments that follow, the Italian delegation will also refer to the preceding document (A/CN.9/WG.IV/WP.89) with an enclosed advisory opinion prepared by Professor Geneviève Burdeau at the request of the Secretariat.

2. The underlying concern is that existing international legal instruments making reference to "writing", "signature" and "document" may not allow for their electronic equivalents and that this may constitute a barrier to the development of electronic commerce and a disadvantage in relation to traditional commerce practice.

3. The Secretariat approached the issue, very appropriately, in two ways. With its document A/CN.9/WG.IV/WP.94, it conducted a survey of international legal instruments deposited with the Secretary-General, with the aim of identifying possible legal barriers to the development of electronic commerce. With its preceding document A/CN.9/WG.IV/WP.89, it distributed an advisory opinion by Ms. Burdeau suggesting that, at the initiative of UNCITRAL, an interpretative agreement be concluded, in simplified form, for the purpose of specifying and supplementing the definition of the terms "writing", "signature" and "document" in all existing and future international instruments, irrespective of their legal status, and that this agreement be reinforced by a General Assembly resolution as well as recommendations by the Organisation for Economic Co-operation and Development and the World Trade Organization (WTO) General Council, among others. The French delegation, by its note annexed to document A/CN.9/WG.IV/WP.93, basically endorsed this suggestion, recommending, however, that, instead of an agreement that would interpret, modify or amend existing treaties, a new agreement be concluded, providing for electronic equivalents.

4. In the opinion of the Italian delegation, the survey contained in document A/CN.9/WG.IV/WP.94 is of fundamental importance to place in its proper context the suggestion for an omnibus agreement along the lines indicated in the advisory opinion by Professor Burdeau or in the note by the French delegation. When we look at the above survey, we see that all legal instruments surveyed fall into the following few categories with respect to their potential for raising barriers to electronic commerce.
5. A large group of instruments, according to the Secretariat, raise no issue and require no action. This applies to instruments identified in document A/CN.9/WG.IV/WP.94 as: I,15; II,A,9; II,A,13; II,A,14; II,B,1; II,B,19; II,B,8; II,B,12; II,B,13; II,B,14; II,B,22; II,B,21; II,B,23; II,C,2; II,D,1; II,E,2.
6. A second group of surveyed instruments, according to the Secretariat, raises issues that cannot be solved by the simple principle of electronic equivalent, because, for example, they imply notions of “location”, “dispatch and receipt of an offer” or similar notions that require a more complex adaptation to the electronic environment. Such issues, indeed, are among those covered by the draft convention on electronic contracting (document A/CN.9/WG.IV/WP.95) or should be covered by other conventions that are being considered by the UNCITRAL Working Group on Electronic Commerce, such as the convention on transfer of rights (on tangible or intangible goods) by electronic means, or the convention on online dispute settlement systems. This is the case of the instruments identified in document A/CN.9/WG.IV/WP.94 as: I,7; I,10; I,12; I,13; II,B,26; II,D,3; II,D,4; II,E,1; III,1; III,2.
7. A third group of surveyed instruments, according to the Secretariat, raises issues of a trade policy nature. The relevant instruments are addressed to States and are not applicable to private law transactions. For these issues, rather than an UNCITRAL-sponsored omnibus agreement of the type envisaged in document A/CN.9/WG.IV/WP.89, the appropriate action, if any, should come, according to the Secretariat, from other international organizations, mainly WTO. This is the case of the instruments identified in document A/CN.9/WG.IV/WP.94 as: I,3; II,A,5; II,A,15; II,A,17; II,A,18.
8. Finally, the Secretariat identifies two instruments relating to international transport (II,A,16 and II,B,11) that, in all likelihood, would require some special adaptation provisions.
9. What is striking in this connection is the absence, among the international legal instruments surveyed, of an instrument for which the proposed omnibus agreement would reach its intended general purpose. All the surveyed legal instruments, in one way or another, seem to require either no action or a very specific action that could not be confined to the mere establishment of the principle of the electronic equivalent, whenever the terms “writing”, “signature” and “document” are used. This should by no means lead to the conclusion that an omnibus agreement of the type envisaged in document A/CN.9/WG.IV/WP.89 would be useless; simply, the conclusion appears to be that the need for such an agreement is rather residual and that, in addition, caution should be exercised for those cases where the mere application of the principle of electronic equivalent would either not reach the intended purposes or be inconsistent with other provisions of the instrument, which, for example, clearly refer only to a physical document (one

might think of an instrument providing for the keeping of a document in a safe, which would be applicable only to a physical document, or a printed copy of an electronic document).

10. Given the above, the Italian delegation suggests first of all that the UNCITRAL Working Group on Electronic Commerce completes its work not only in connection with the convention on electronic contracting but also in the other areas identified, such as the electronic transfer of rights in tangible goods, electronic transfer of intangible rights and online dispute settlement systems. Upon completion of this work, the Italian delegation maintains that the bulk of the problems intended to be solved with the omnibus protocol envisaged in document A/CN.9/WG.IV/WP.89 will have already been solved in a more appropriate way.

11. Having said that, the Italian delegation feels that establishing in an international agreement the principle that “the use of the terms ‘writing’, ‘signature’ and ‘document’ in international legal instruments should extend to their electronic equivalent” is something that should be done. However, any such agreement in this respect should be qualified with the condition that the electronic equivalent principle should apply only whenever feasible and whenever not inconsistent with other provisions of the legal instrument in question. It should, in other words, constitute a kind of agreement in principle, aimed at engendering a practice and an *opinio juris* that could result in the emergence of a new customary rule allowing for electronic equivalents in the context of international trade (see para. 10 of the note by the French delegation, document A/CN.9/WG.IV/WP.93).

12. Along these lines, whether or not this agreement is called “interpretative” or otherwise does not make much difference. The Italian delegation agrees, however, that UNCITRAL is the proper forum for drawing up such an agreement and suggests that it be simply included, by way of an additional article to the existing text discussed at the thirty-ninth session of the Working Group, in the draft convention on electronic contracting presently under consideration. It may constitute a provision that would slightly exceed the scope of the draft convention, but this risk would be outweighed by many other practical advantages, including that of a simpler approach and a probably easier approval process.

### 3. Oman

[Original: Arabic]

[11 April 2002]

1. As a next phase, emphasis should be placed on the need to examine the texts of treaties deposited with regional entities, such as the League of Arab States, the Gulf Cooperation Council, WTO, the World Intellectual Property Organization (WIPO) and other international entities.

2. The United Nations Commission on International Trade Law, through its Working Group, should consider the possible inclusion of certain trade operations into the UNCITRAL Model Law on Electronic Commerce, such as contracts for the international sale of goods, transport of passengers, carriage of goods, insurance operations, bank guarantees and standby letters of credit and other relevant items. The Model Law should not be limited to the transport of goods but should rather cover all that the Working Group may deem appropriate for inclusion in the Model Law, such as maritime liens and mortgages and recognition of the documentary

form of arbitration agreements. Such operations should be introduced into the text of the Model Law rather than being incorporated into several international treaties. As a result, any State can be able to enact legislation for electronic commerce, making use of the commercial operations contained in the Model Law.

3. The existing disagreement on electronic sales in the context of the international sale of goods should be resolved and thus the word “goods” should cover intangible things, such as patent rights, trademarks, know-how and purchase through digital loading etc; sufficient identification of movable material goods, tangible or intangible; and solving the problematic swing in the extent to which goods are considered tangible or intangible, such as downloading musical or film digital files from the purchase site directly.

## **B. Intergovernmental organizations**

### **1. International Civil Aviation Organization**

[Original: English]  
[3 June 2002]

1. The International Civil Aviation Organization (ICAO) considers the survey that is being conducted by UNCITRAL very useful and wishes to submit for consideration for inclusion in the survey a number of legal instruments in the field of international air transport. The following instruments would appear to lend themselves for consideration in this respect:

(a) Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929 (Second International Air Law Conference, Warsaw, 1929). This instrument requires, inter alia, the delivery of a passenger ticket (article 3), mentions the requirement of a luggage ticket to be made out in duplicate (article 4) and addresses in articles 5 to 16 the nature, content and function of the air consignment note. Further, article 26, paragraph 3, mentions that a complaint must be made “in writing”. (These examples, as well as the ones to follow below, are given for illustrative purposes and are not necessarily exhaustive);

(b) Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, signed at The Hague on 28 September 1955 (Doc 7632). This instrument also contains a number of provisions dealing with the required contents of air transport documents (see for example articles III, IV and V to IX) and article XI, substituting article 22 of the Warsaw Convention, contains a reference to the air carrier having provided “in writing” an offer for the settlement of a claim;

(c) Convention Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier, signed at Guadalajara on 18 September 1961 (Doc 8181). In light of article IV of this instrument, it may be useful to include the Convention in the survey;

(d) Additional Protocol No. 2 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 as Amended by the Protocol done at The Hague on 28 September

1955, signed at Montreal on 25 September 1975 (Doc 9146). Article II of this instrument, amending article 22 of the Hague Protocol, contains a reference to an offer to be made to the plaintiff “in writing” ;

(e) Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 as Amended by the Protocol done at The Hague on 28 September 1955, signed at Montreal on 25 September 1975 (Doc 9148). With respect to the carriage of cargo, this instrument provides, inter alia, for the substitution of the delivery of the air waybill, with the consent of the consignor, by “any other means” which would preserve a record of the carriage to be performed. If such other means are used, and if requested by the consignor, the carrier shall deliver to the consignor a “receipt” for the cargo permitting identification of the consignment and access to the information contained in the record preserved by such other means (see article III, amending article 5 of the Warsaw/Hague provisions). Article 6, as amended by the Protocol, contains a number of references to the “signing” of the air waybill, and article 12 contains a reference to the “production” of the part of the air waybill or the receipt for the cargo.

(f) Convention for the Unification of Certain Rules for International Carriage by Air, done at Montreal on 28 May 1999 (Doc 9740). Article 3 of this instrument describes the format and contents of the various air transport documents and contains references to a “written statement”, a “baggage identification tag” and a “written notice”. This instrument essentially incorporates in articles 4 to 16 the respective provisions of Montreal Protocol No. 4, with some minor modifications. Article 31, paragraph 3, contains a reference to the requirement of a complaint to be made “in writing” and further requires in article 34, paragraph 1, that an arbitration agreement be made “in writing”.

## **2. International Maritime Organization**

[Original: English]  
[14 May 2002]

1. The International Maritime Organization (IMO) believes that one IMO instrument may be relevant to UNCITRAL’s survey.
2. The Convention on Facilitation of International Maritime Traffic, 1965 (FAL) is intended, as expressed in the preamble to the Convention, “to facilitate maritime traffic by simplifying and reducing to a minimum the formalities, documentary requirements and procedures on the arrival, stay and departure of ships engaged in international voyages.” The FAL Convention now has 91 State-parties. Part C of Section C of the annex to this Convention contains recommended practices and standards concerning “electronic data-processing techniques”.

## **3. United Nations Educational, Scientific and Cultural Organization**

[Original: English]  
[30 May 2002]

The instruments for which the United Nations Educational, Scientific and Cultural Organization (UNESCO) acts as depositary cover the fields of education, science, culture and communication, and none of them appear to come within the

scope of international trade instruments, as mentioned in the letter from the UNCITRAL secretariat.

#### 4. World Intellectual Property Organization

[Original: English]  
[28 May 2002]

1. The World Intellectual Property Organization (WIPO) has a longstanding tradition of collaboration with UNICTRAL. The work conducted by UNCITRAL is held in the highest regard by WIPO, and some of the instruments that have resulted from that work are deemed to be part of the most significant achievements by an organization of the United Nations system in the commercial and digital arenas. With regard to the mandate of WIPO, particular reference is made in this regard to the accomplishments of UNCITRAL in the area of commercial arbitration and electronic commerce.

2. In our age, technological developments, including information technology and the Internet, arguably are the primary driving factors behind the evolution of the intellectual property system. At the same time, the intellectual property system is the principal legal framework relied upon by the creators of these new technologies as a means of reaping rewards for their investments. In light of this close and inseparable relationship between modern technologies and intellectual property, one of the critical tasks of the WIPO member States and Secretariat is to monitor, on an ongoing basis, the treaties administered by WIPO to determine whether their provisions remain in line with technological developments, including the Internet, and to propose amendments to these instruments should the need arise.

3. Specifically with regard to any requirements in the WIPO-administered treaties with respect to “writing”, “signatures” and “documents”, significant work already has been and continues to be undertaken by WIPO with a view to facilitating, at the international level, the electronic filing of patent and trademark applications. Particular reference can be made in this regard to certain provisions of the Patent Law Treaty (PLT), the Trademark Law Treaty (TLT) and the Patent Cooperation Treaty (PCT) (with regard to the latter, the Standard for the Electronic Filing and Processing of International Applications).

4. Considering, therefore, that the work contemplated in the letter from UNCITRAL, to a large degree, is already under way at WIPO in respect of the treaties that the Organization administers, it is felt that it would not be opportune to repeat this process within a different institution, especially because a proper appreciation of the relevant provisions of the WIPO treaties, as well as the changes that might be required to them, requires a thorough understanding of the practices of national intellectual property offices and their interaction with the international patent and trademark system. Furthermore, the WIPO Secretariat would be concerned that duplication of efforts in different institutions might lead to confusion and inconsistent results.

5. Notwithstanding the above, the WIPO Secretariat is fully prepared to assist UNCITRAL in its work in a manner that is both helpful and avoids these potential difficulties. To that end, the WIPO Secretariat proposes to organize, at a mutually convenient place and time, a briefing session for the benefit of the UNCITRAL

secretariat so that it may familiarize itself with the work of WIPO aimed at updating its treaties with a view to their application in the digital environment.

## 5. World Customs Organization

[Original: English]

[10 June 2002]

1. The World Customs Organization (WCO) is thankful for the invitation to contribute to the UNCITRAL comprehensive survey concerning possible legal barriers to the development of electronic commerce in international instruments.

2. WCO adopted in 2001 the Baku Declaration on e-commerce, which requested customs services to apply a comprehensive e-commerce strategy by:

(a) Simplifying customs processes and requirements while achieving higher levels of compliance and security which, in turn, will reduce burdens on trade and achieve lower compliance costs;

(b) Developing seamless international trade transactions and associated standardized processes and data flows that can be used successfully across the WCO membership and that build on the WCO Customs Data Model and the revised Kyoto Convention;

(c) Ensuring that the use of e-commerce enables customs administrations to identify and manage risk at a much earlier stage and improve the targeting of resources to the highest risk areas;

(d) Placing greater reliance on the use of commercial data to fulfil customs requirements;

(e) Ensuring secure, accessible requirements and the availability of reliable IT systems that are user-friendly and are capable of recycling information;

(f) Exploiting the potential to improve the exchange of information and intelligence between member administrations and, in particular, to build on the Unique Consignment Reference (UCR) Number concept for end-to-end international trade transaction audit trails;

(g) Developing closer relations with other government agencies involved in international trade in order to facilitate the seamless transfer of international trade data (single window concept) and to exchange risk intelligence at both national and international levels;

(h) Ensuring that all relevant international trade rules are updated so that the electronic functional equivalents of “documents” and “signatures” are legally valid;

(i) Ensuring that all levels of staff are provided with the necessary training to build up the skills required to operate in a fully automated electronic environment.

3. It can be noted from this development that WCO very much welcomes this opportunity to provide UNCITRAL with details about some of its instruments, which it would like to request to have included in the UNCITRAL survey:

(a) International Convention on the simplification and harmonization of Customs procedures as amended (Revised Kyoto Convention); signed on 26 June 1999, not yet entered into force (10 of the required 40 signatories);

(b) Convention on temporary admission (Istanbul Convention); signed on 26 June 1990, entered into force on 27 November 1993; 38 Contracting Parties;

(c) Customs Convention on the ATA carnet for the temporary admission of goods; entered into force on 30 July 1963, 62 Contracting Parties;

(d) Recommendation of the Customs Cooperation Council (CCC, now WCO) concerning Customs requirements regarding commercial invoices, signed on 16 May 1979;

(e) Recommendation of the Customs Cooperation Council concerning the transmission and authentication of customs information which is processed by computer, signed on 16 June 1981.

4. The Secretariat of WCO is very interested in an ongoing cooperation with UNCITRAL and looks forward to receiving a copy of the final results in due course.

## 6. Council of Europe

[Original: English]  
[24 June 2002]

1. The Council of Europe has considered the undertaking of UNCITRAL to identify and remove the possible legal barriers to electronic commerce resulting from international trade law instruments and the survey that the secretariat of UNCITRAL is now carrying out to identify such relevant international trade law instruments with great attention and interest.

2. The Secretariat of the Council of Europe would like to inform the UNCITRAL secretariat that the Council of Europe Convention on information and Legal Cooperation concerning "Information Society Services" (ETS 180) enables to enlarge the application of the European Union Directive EC/98/34 (as modified by Directive EC/98/48) to those member States of the Council of Europe that are not members of the European Union. This Convention, open to signature in Moscow in October 2001, aims at setting up a legal information and cooperation system in the area of new communication services following the example of Directive 98/48/EC, which will enable participating States to be aware of and provides comments on draft legislation on "Information Society Services". These new services, called "Information Society Services" are in fact activities of an interactive nature provided online, normally for a remuneration. This Council of Europe Convention, together with the Directive, should be reflected in the UNCITRAL survey, as an important tool to develop and facilitate international trade beyond the European Union area and between the latter and those member States of the Council of Europe that are not members of the European Union.

3. Moreover, the Council of Europe would like to draw the attention of UNCITRAL to the work of the Council of Europe in the field of personal data protection, which is carried out on the basis of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 1981 (ETS 108). This work has resulted in a number of recommendations and reports that may

have implications for electronic commerce. In particular, the “Model contract to ensure equivalent data protection in the context of transborder data flows” (available on the Internet site of the Council of Europe at <http://www.coe.int>), which was jointly prepared with the European Commission and the International Chamber of Commerce in 1992 and is currently being updated, lays down contractual clauses aiming at personal data protection in contracts involving transborder data flows to countries that do not ensure adequate protection of personal data.

## 7. Latin-American Integration Association

[Original: Spanish]  
[17 May 2002]

The General Secretariat of the Latin-American Integration Association (ALADI) has undertaken studies on the current situation and perspectives of electronic commerce in the 12 member States of the Association, which, among other things, contain chapters analysing the legal and regulatory framework for electronic commerce in the region. The studies on electronic commerce can be found (in Spanish and Portuguese) on the ALADI web site ([www.aladi.org](http://www.aladi.org)) under the links “Portal comercio electrónico (electronic commerce portal)—Estudios e informes (studies and reports)—Organismos internacionales (international organizations)—ALADI”. The above-mentioned page, in particular the link “Normativa (rules)”, also contains information on laws and regulations relating to electronic commerce in the member States of ALADI.

## C. International non-governmental organizations

### 1. International Federation of Freight Forwarders Associations

[Original: English]  
[24 April 2002]

The International Federation of Freight Forwarders Associations (FIATA) suggests that the following international conventions be added:

(a) Air transport: Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929 (Warsaw Convention), amended by Montreal Protocol No. 4, and the Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention 1999);

(b) Rail transport: Convention concerning international carriage by rail (COTIF).

### Notes

<sup>1</sup> *Official Records of the General Assembly, Fifty-Sixth Session, Supplement No. 17 and corrigendum (A/56/17 and Corr. 3)*, paras. 291-293.