United Nations A/CN.9/WG.IV/WP.98/Add.4

General Assembly

Distr.: Limited
4 October 2002

Original: English/French

United Nations Commission on International Trade Law
Working Group on Electronic Commerce
Fortieth session
Vienna, 14-18 October 2002

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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V.02-58493 (E) 101002 111002

II. Compilation of comments

A. States

Switzerland

[Original: English/French]
[3 October 2002]

1. The Swiss delegation shares the view taken by the Secretariat in its conclusions of document A/CN.9/WG.IV/WP.94. It therefore believes that, rather than creating a new instrument in form of an omnibus agreement, an "omnibus clause" should be included in the conventions in elaboration in the different areas concerned by the proposed agreement, such as electronic contracting, transport law, transfer of rights and arbitration.

2. The main objective of the proposed omnibus agreement, the equal treatment of writing and its electronic equivalents in the context of commercial transactions, is one of the subject matters of the draft convention on certain issues of electronic contracting. Art. 13 of the draft provides that, in the national legislation of the member States, the terms "in writing" and "signature" are deemed to allow for electronic equivalents. This rule could, by way of an "omnibus clause", be extended to certain international instruments dealing with electronic commerce.

3. However, there are barriers to electronic transactions that are not considered by the mentioned draft convention, for example the one addressed by Art. 5 of the UNCITRAL Model Law on Electronic Commerce of 1996, which lays down the general principle that a communication cannot be denied legal effect on the grounds that it is in the form of a data message. This principle would be of importance in the present context, especially for notifications and declarations made under the Convention on the Limitation Period in the International Sale of Goods or the Convention on Contracts for the International Sale of Goods or for communications made under the Convention on the Liability of Operators of Transport Terminals in International Trade (see p. 6 ff. and 10 f. of document A/CN.9/WG.IV/WP.94). The Swiss delegation therefore feels that a provision enacting this principle with regard to national legislation's should be added to the draft convention on electronic contracting and supplemented by an "omnibus clause" extending its scope to certain international conventions and agreements.

4. What the draft convention does cover is the question at what time and at what place a communication in electronic form is deemed to have been pronounced or received (Art. 11). Here one could also extend the scope of the given rule to certain international instruments.

5. The Swiss delegation also shares the view of the Secretariat that the questions arising in connection with electronic substitution of transport papers or (other) negotiable instruments or in connection with arbitration are of particular nature and require an in-depth analysis for which the meetings held by the Working Group or other bodies on the topics transfer of rights through electronic means, transport law and arbitration would be the proper forums.

6. The Swiss delegation endorses the Belgian position (document A/CN.9/WG.IV/WP.98/Add.2) whereas the difficulties arising in connection with

"virtual goods" under the Convention on Contracts for the International Sale of Goods are not related as such to the use of electronic data in the context of a contract and arise merely from the definition of the scope of the convention. The issue should therefore be discussed at the occasion of a possible revision of that convention.

7. As to the nature of a possible omnibus agreement or the "omnibus clauses" to be incorporated in other instruments dealing with issues of electronic commerce, two different conceptions have been presented to the Working Group. The study of Professor Burdeau (annex to document A/CN.9/WG.IV/WP.89) considers an interpretative agreement to be sufficient to eliminate the barriers for electronic commerce in existing treaties. The French delegation (document A/CN.9/WG.IV/WP.93) in contrast doesn't even seem to see any necessity for an interpretative agreement and proposes that the new instrument should be limited to a supplementary agreement, allowing for electronic equivalents without interpreting, modifying or amending the existing treaties. In the view of the Swiss delegation the question whether an amendment or simply a completion of existing treaties is needed cannot be decided a priori. To answer it one would have to look at the involved treaties individually and interpret them pursuant to their own interpretation rules. Such a review can lead to three different results: 1.) The treaty allows for electronic equivalents; 2.) The treaty does not allow for electronic equivalents and 3.) The treaty does not cover the issue. In the first case no action has to be taken; in the second case the treaty has to be amended and in the third case it is enough to adopt supplementary provisions in a new instrument. This means that, to be sure that it is effective in relationship to all the envisaged instruments (and be considered that way by the national courts), the omnibus agreement should take into account the possibility that it might imply an amendment of some of the instruments and therefore observe the form of a revision. This might be of relevance where an international instrument lays down special rules for its revision and its member States are not identical with the ones of the omnibus agreement. The Swiss delegation does not see the possibility of getting around the necessity of a revision by choosing the form of an authentic interpretation. Changing the rules for the interpretation of an instrument means amending it and therefore has to be treated as a revision.

B. Intergovernmental organizations

Organisation for Economic Cooperation and Development

[Original: English]
[11 September 2002]

1. The Organisation for Economic Cooperation and Development (OECD) is happy to confirm that according to its analysis the OECD has no instrument falling within the scope of UNCITRAL's survey.

2. OECD points out that it certainly has instruments in the domain of electronic commerce, but these are clearly not intended to constitute legal barriers to the use of electronic commerce.

3. The OECD instruments usually take the form of recommendations which are not legally binding, but which represent the political will of member countries.

4. Examples of recommendations relevant to electronic commerce are those on privacy (1980), cryptography policy (1997), consumer protection (1999) and security of information systems (2002), the texts of which are posted on the OECD web site (see http://www.oecd.org/legal).