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**United Nations Commission
on International Trade Law**
Working Group on Electronic Commerce
Forty-fourth session
Vienna, 11-22 October 2004

Annotated provisional agenda

I. Provisional agenda

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Electronic contracting: provisions for a draft convention.
5. Other business.
6. Adoption of the report.

II. Composition of the Working Group

1. The Working Group is composed of all States members of the Commission, which are the following States: Algeria, Argentina, Australia, Austria, Belarus, Belgium, Benin, Brazil, Cameroon, Canada, Chile, China, Colombia, Croatia, Czech Republic, Ecuador, Fiji, France, Gabon, Germany, Guatemala, India, Iran (Islamic Republic of), Israel, Italy, Japan, Jordan, Kenya, Lebanon, Lithuania, Madagascar, Mexico, Mongolia, Morocco, Nigeria, Pakistan, Paraguay, Poland, Qatar, Republic of Korea, Russian Federation, Rwanda, Serbia and Montenegro, Sierra Leone, Singapore, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Thailand, The former Yugoslav Republic of Macedonia, Tunisia, Turkey, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Venezuela and Zimbabwe.
2. In addition, States that are not members of the Commission, as well as relevant intergovernmental organizations and international non-governmental organizations, may be invited to attend the session as observers. In accordance with established



UNCITRAL practice, observer delegations may participate actively in the deliberations leading to decisions, which are taken by consensus.

III. Annotations to agenda items

1. Opening of the session and scheduling of meetings

3. The forty-fourth session of the Working Group will be held at the Vienna International Centre from 11 to 22 October 2004. Meeting hours will be from 9.30 a.m. to 12.30 p.m. and from 2 p.m. to 5 p.m., except on Monday, 11 October 2004, when the session will opened at 10 a.m. There will be eight working days available for consideration of the agenda items at the session. No formal meeting will be scheduled for Thursday, 21 October, to allow for the preparation of the draft report of the session, which will be adopted on Friday, 22 October 2004.

2. Election of officers

4. In accordance with its practice at previous sessions, the Working Group may wish to elect a Chairman and a Rapporteur.

4. Electronic contracting: provisions for a draft convention

(a) Previous deliberations of the Working Group

5. At its thirty-third session (New York, 17 June-7 July 2000), the United Nations Commission on International Trade Law (UNCITRAL) held a preliminary exchange of views on proposals for future work in the field of electronic commerce. The three suggested topics were: electronic contracting, considered from the perspective of the United Nations Sales Convention on Contracts for the International Sale of Goods (the "United Nations Sales Convention");¹ online dispute settlement, and dematerialization of documents of title, in particular in the transport industry.

6. The Commission welcomed those suggestions. The Commission generally agreed that, upon completing the preparation of the Model Law on Electronic Signatures, the Working Group would be expected to examine, at its thirty-eighth session, some or all of the above-mentioned topics, as well as any additional topic, with a view to making more specific proposals for future work by the Commission at its thirty-fourth session, in 2001. It was agreed that work to be carried out by the Working Group could involve consideration of several topics in parallel as well as preliminary discussion of the contents of possible uniform rules on certain aspects of the above-mentioned topics.²

7. The Working Group considered those proposals at its thirty-eighth session (New York, 12-23 March 2001), on the basis of a set of notes dealing with a possible convention to remove obstacles to electronic commerce in existing international conventions (A/CN.9/WG.IV/WP.89); dematerialization of documents of title (A/CN.9/WG.IV/WP.90); and electronic contracting (A/CN.9/WG.IV/WP.91).

8. The Working Group held an extensive discussion on issues related to electronic contracting (A/CN.9/484, paras. 94-127). The Working Group concluded its deliberations by recommending to the Commission to start work towards the preparation of an international instrument dealing with certain issues in electronic

contracting on a priority basis. At the same time, the Working Group recommended that the Secretariat be entrusted with the preparation of the necessary studies concerning three other topics considered by the Working Group: (a) a comprehensive survey of possible legal barriers to the development of electronic commerce in international instruments; (b) a further study of the issues related to transfer of rights, in particular, rights in tangible goods, by electronic means and mechanisms for publicizing and keeping a record of acts of transfer or the creation of security interests in such goods; and (c) a study discussing the UNCITRAL Model Law on International Commercial Arbitration, as well as the UNCITRAL Arbitration Rules, to assess their appropriateness for meeting the specific needs of online arbitration (A/CN.9/484, para. 134).

9. At the thirty-fourth session of the Commission (Vienna, 25 June-13 July 2001), there was wide support for the recommendations made by the Working Group, which were found to constitute a sound basis for future work by the Commission. Views varied, however, as regards the relative priority to be assigned to the different topics. One line of thought was that a project aimed at removing obstacles to electronic commerce in existing instruments should have priority over the other topics, in particular over the preparation of a new international instrument dealing with electronic contracting. It was said that references to “writing”, “signature”, “document” and other similar provisions in existing uniform law conventions and trade agreements had already created legal obstacles and generated uncertainty in international transactions conducted by electronic means. Efforts to remove those obstacles should not be delayed or neglected by attaching higher priority to issues of electronic contracting.

10. The prevailing view, however, was in favour of the order of priority that had been recommended by the Working Group. It was pointed out, in that connection, that the preparation of an international instrument dealing with issues of electronic contracting and the consideration of appropriate ways for removing obstacles to electronic commerce in existing uniform law conventions and trade agreements were not mutually exclusive. The Commission was reminded of the common understanding reached at its thirty-third session that work to be carried out by the Working Group could involve consideration of several topics in parallel.³

11. There were also differing views regarding the scope of future work on electronic contracting, as well as the appropriate moment to begin that work. Pursuant to one view, the work should be limited to contracts for the sale of tangible goods. The opposite view, which prevailed in the course of the Commission’s deliberations, was that the Working Group on Electronic Commerce should be given a broad mandate to deal with issues of electronic contracting, without narrowing the scope of the work from the outset. It was understood, however, that consumer transactions and contracts granting limited use of intellectual property rights would not be dealt with by the Working Group. The Commission took note of the preliminary working assumption made by the Working Group that the form of the instrument to be prepared could be that of a stand-alone convention dealing broadly with the issues of contract formation in electronic commerce (A/CN.9/484, para. 124). The new instrument should not negatively affect the well-established regime of the United Nations Sales Convention (A/CN.9/484, para. 95), and should not interfere with the law of contract formation in general. Broad support was given to the idea expressed in the context of the thirty-eighth session of the Working

Group that, to the extent possible, the treatment of Internet-based sales transactions should not differ from the treatment given to sales transactions conducted by more traditional means (A/CN.9/484, para. 102).

12. As regards the timing of the work to be undertaken by the Working Group, there was support for commencing consideration of future work without delay during the third quarter of 2001. However, strong views were expressed that it would be preferable for the Working Group to wait until the first quarter of 2002, so as to afford States sufficient time to hold internal consultations. The Commission accepted that suggestion and decided that the first meeting of the Working Group on issues of electronic contracting should take place in the first quarter of 2002.⁴

13. At its thirty-ninth session (New York, 11-15 March 2002), the Working Group considered a note by the Secretariat discussing selected issues on electronic contracting, which contained in its annex I an initial draft tentatively entitled "Preliminary draft Convention on [International] Contracts Concluded or Evidenced by Data Messages" (A/CN.9/WG.IV/WP.95). The Working Group further considered a note by the Secretariat transmitting comments that had been formulated by an ad hoc expert group established by the International Chamber of Commerce to examine the issues raised in document A/CN.9/WG.IV/WP.95 and the draft provisions set out in its annex I (A/CN.9/WG.IV/WP.96).

14. The Working Group considered first the form and scope of the preliminary draft convention (see A/CN.9/509, paras. 18-40). The Working Group agreed to postpone discussion on exclusions from the draft convention until it had had an opportunity to consider the provisions related to location of the parties and contract formation. In particular, the Working Group decided to proceed with its deliberations by first taking up articles 7 and 14, both of which dealt with issues related to the location of the parties (A/CN.9/509, paras. 41-65). After it had completed its initial review of those provisions, the Working Group proceeded to consider the provisions dealing with contract formation in articles 8-13 (A/CN.9/509, paras. 66-121). The Working Group concluded its deliberations on the draft convention with a discussion of draft article 15 (A/CN.9/509, paras. 122-125). The Working Group agreed that it should consider articles 2 to 4, dealing with the sphere of application of the draft convention, and articles 5 (Definitions) and 6 (Interpretation), at its fortieth session. The Working Group requested the Secretariat to prepare a revised version of the preliminary draft convention, based on those deliberations and decisions, for consideration by the Working Group at its fortieth session.

15. Furthermore, at the closing of that session, the Working Group was informed of the progress that had been made by the Secretariat in connection with the survey of possible legal obstacles to electronic commerce in existing trade-related instruments. The Working Group noted that the Secretariat had begun the work by identifying and reviewing trade-relevant instruments from among the large number of multilateral treaties that were deposited with the Secretary-General. The Secretariat had 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 were set out in a note by the Secretariat (A/CN.9/WG.IV/WP.94). 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 preliminary conclusions of the survey. 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 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 (A/CN.9/509, para. 16).

16. The Commission considered the Working Group's report at its thirty-fifth session (New York, 17-28 June 2002). The Commission noted with appreciation that the Working Group had started its consideration of a possible international instrument dealing with selected issues on electronic contracting. The Commission reaffirmed its belief that an international instrument dealing with certain issues of electronic contracting might be a useful contribution to facilitate the use of modern means of communication in cross-border commercial transactions. The Commission commended the Working Group for the progress made in that regard. However, the Commission also took note of the varying views that had been expressed within the Working Group concerning the form and scope of the instrument, its underlying principles and some of its main features. The Commission noted, in particular, the proposal that the Working Group's considerations should not be limited to electronic contracts, but should apply to commercial contracts in general, irrespective of the means used in their negotiation. The Commission was of the view that member and observer States participating in the Working Group's deliberations should have ample time for consultations on those important issues. For that purpose, the Commission considered that it might be preferable for the Working Group to postpone its discussions on a possible international instrument dealing with selected issues on electronic contracting until its forty-first session, to be held in New York from 5 to 9 May 2003.⁵

17. As regards the Working Group's consideration of possible legal obstacles to electronic commerce that might result from trade-related international instruments, the Commission reiterated its support for the efforts of the Working Group and the Secretariat in that respect. The Commission requested the Working Group to devote most of its time at its fortieth session, in October 2002, to a substantive discussion of various issues that had been raised in the Secretariat's initial survey (A/CN.9/WG.IV/WP.94).⁶

18. At its fortieth session (Vienna, 14-18 October 2002), the Working Group reviewed the survey of possible legal barriers to electronic commerce contained in document A/CN.9/WG.IV/WP.94. The Working Group generally agreed with the analysis and endorsed the recommendations that had been made by the Secretariat (see A/CN.9/527, paras. 24-71). The Working Group agreed to recommend that the Secretariat take up the suggestions for expanding the scope of the survey so as to review possible obstacles to electronic commerce in additional instruments that had been proposed for inclusion in the survey by other organizations and explore with those organizations the modalities for carrying out the necessary studies, taking into account the possible constraints put on the Secretariat by its current workload. The Working Group invited member States to assist the Secretariat in that task by

identifying appropriate experts or sources of information in respect of the various specific fields of expertise covered by the relevant international instruments.

19. The Working Group used the remaining time at that session to resume its deliberations on the preliminary draft convention, which it began by a general discussion on the scope of the preliminary draft convention (see A/CN.9/527, paras. 72-81). The Working Group proceeded to consider articles 2 to 4, dealing with the sphere of application of the draft convention and articles 5 (Definitions) and 6 (Interpretation) (A/CN.9/527, paras. 82-126). The Working Group requested the Secretariat to prepare a revised text of the preliminary draft convention for consideration at its forty-first session.

20. The Working Group resumed its deliberations on the preliminary draft convention at its forty-first session (New York, 5-9 May 2003), when it held a general discussion on the purpose and nature of the preliminary draft convention (see A/CN.9/528, paras. 28-31). The Working Group noted that a task force that had been established by the International Chamber of Commerce had submitted comments on the scope and purpose of the draft convention (A/CN.9/WG.IV/WP.101, annex). The Working Group generally welcomed the work being undertaken by private sector representatives, such as the International Chamber of Commerce, which was considered to complement usefully the work being undertaken in the Working Group to develop an international convention.

21. The Working Group proceeded to review articles 1-11 of the revised preliminary draft convention contained in the note by the Secretariat (A/CN.9/WG.IV/WP.100, annex I). The decisions and deliberations of the Working Group with respect to the draft convention are reflected in chapter IV of the report on its forty-first session (see A/CN.9/528, paras. 26-151). The Secretariat was requested to prepare a revised version of the preliminary draft convention for future consideration by the Working Group.

22. In accordance with a decision taken at its fortieth session (see A/CN.9/527, para. 93), the Working Group also held a preliminary discussion on the question of excluding intellectual property rights from the draft convention (see A/CN.9/528, paras. 55-60). The Working Group agreed that the Secretariat should be requested to seek the specific advice of relevant international organizations, such as the World Intellectual Property Organization (WIPO) and the World Trade Organization, as to whether, in the view of those organizations, including contracts that involved the licensing of intellectual property rights in the scope of the draft convention so as to expressly recognize the use of data messages in the context of those contracts might negatively interfere with rules on the protection of intellectual property rights. It was agreed that whether or not such an exclusion was necessary would ultimately depend on the substantive scope of the convention.

23. The Working Group also exchanged views on the relationship between the draft convention and the Working Group's efforts to remove possible legal obstacles to electronic commerce in existing international instruments relating to international trade within the context of its preliminary review of draft article X (currently draft article 19[Y]), which the Working Group agreed to retain in substance for further consideration.

24. At its thirty-sixth session (Vienna, 30 June-11 July 2003), the Commission noted the progress made by the Secretariat in connection with a survey of possible

legal barriers to the development of electronic commerce in international trade-related instruments. The Commission reiterated its belief in the importance of that project and its support for the efforts of the Working Group and the Secretariat in that respect. The Commission noted that the Working Group had recommended that the Secretariat expand the scope of the survey to review possible obstacles to electronic commerce in additional instruments that had been proposed to be included in the survey by other organizations and to explore with those organizations the modalities for carrying out the necessary studies, taking into account the possible constraints put on the Secretariat by its current workload. The Commission called on member States to assist the Secretariat in that task by inviting appropriate experts or sources of information in respect of the various specific fields of expertise covered by the relevant international instruments.⁷

25. The Commission further noted with appreciation that the Working Group had continued its consideration of a preliminary draft convention dealing with selected issues related to electronic contracting. The Commission reaffirmed its belief that the instrument under consideration would be a useful contribution to facilitate the use of modern means of communication in cross-border commercial transactions. The Commission observed that the form of an international convention had been used by the Working Group thus far as a working assumption, but that did not preclude the choice of another form for the instrument at a later stage of the Working Group's deliberations.⁸

26. The Commission was informed that the Working Group had exchanged views on the relationship between the preliminary draft convention and the Working Group's efforts to remove possible legal obstacles to electronic commerce in existing international instruments relating to international trade within the context of its preliminary review of draft article X, which the Working Group had agreed to retain for further consideration (see A/CN.9/528, para. 25). The Commission expressed support for the Working Group's efforts to tackle both lines of work simultaneously.⁹

27. The Commission was informed that the Working Group had held a preliminary discussion on the question of whether intellectual property rights should be excluded from the draft convention (see A/CN.9/528, paras. 55-60). The Commission noted the Working Group's understanding that its work should not be aimed at providing a substantive law framework for transactions involving "virtual goods", nor was it concerned with the question of whether and to what extent "virtual goods" were or should be covered by the United Nations Sales Convention. The question before the Working Group was whether and to what extent the solutions for electronic contracting being considered in the context of the preliminary draft convention could also apply to transactions involving licensing of intellectual property rights and similar arrangements. The Secretariat was requested to seek the views of other international organizations on the question, in particular WIPO.¹⁰

28. At its forty-second session (Vienna, 17-21 November 2003), the Working Group began its deliberations by holding a general discussion on the scope of the preliminary draft convention. The Working Group, *inter alia*, noted that a task force had been established by the International Chamber of Commerce to develop contractual rules and guidance on legal issues related to electronic commerce, tentatively called "E-terms 2004". The Working Group welcomed the work being

undertaken by the International Chamber of Commerce, which was considered to complement usefully the work being undertaken in the Working Group to develop an international convention. The Working Group was of the view that the two lines of work were not mutually exclusive, in particular since the draft convention dealt with requirements that were typically found in legislation and legal obstacles, being statutory in nature, could not be overcome by contractual provisions or non-binding standards. The Working Group expressed its appreciation to the International Chamber of Commerce for the interest in carrying out its work in cooperation with UNCITRAL and confirmed its readiness to provide comments on drafts that the International Chamber of Commerce would be preparing (see A/CN.9/546, paras. 33-38).

29. The Working Group proceeded to review articles 8 to 15 of the revised preliminary draft convention contained in the annex to the note by the Secretariat (A/CN.9/WG.IV/WP.103). The Working Group agreed to make several amendments in those provisions and requested the Secretariat to prepare a revised draft for future consideration (see A/CN.9/546, paras. 39-135).

30. The Working Group continued its work on this agenda item at its forty-third session (New York, 15-19 March 2004) on the basis of a note by the Secretariat that contained a revised version of the preliminary draft convention (A/CN.9/WG.IV/WP.108). The deliberations of the Working Group focused on draft articles X, Y and 1 to 4 (A/CN.9/548, paras. 13-123). The Working Group held a general discussion on draft articles 5 to 7 bis. The Working Group also considered comments on other provisions that anticipated positions that might be adopted by delegations on the understanding that such comments had no effect on the draft text which will have to be formally examined at the next session. The Secretariat was requested to prepare a revised version of the preliminary draft convention, based on those deliberations and decisions for consideration by the Working Group at its forty-fourth session. The Working Group agreed that it should endeavour to complete its work on the draft convention with a view to enabling its review and approval by the Commission in 2005.

31. At its thirty-seventh session (New York, 14-25 June 2004), the Commission took note of the reports of the Working Group on the work of its forty-second and forty-third sessions (A/CN.9/546 and A/CN.9/548, respectively).

32. The Commission was informed that the Working Group had undertaken a review of articles 8 to 15 of the revised text of the preliminary draft convention at its forty-second session. The Commission noted that the Working Group, at its forty-third session, had reviewed articles X and Y as well as articles 1 to 4 of the draft convention and that the Working Group had held a general discussion on draft articles 5 to 7 bis.

33. The Commission expressed its support for the efforts by the Working Group to incorporate in the draft convention provisions aimed at removing possible legal obstacles to electronic commerce that might arise under existing international trade-related instruments. The Commission was informed that the Working Group had agreed that it should endeavour to complete its work on the draft convention with a view to enabling its review and approval by the Commission in 2005. The Commission expressed its appreciation for the Working Group's endeavours and agreed that a timely completion of the Working Group's deliberations on the draft

convention should be treated as a matter of importance, which would justify approving a two-week forty-fourth session of the Working Group to be held in October 2004.

34. Views were exchanged regarding possible future work in the field of electronic commerce after completion of the current project. While it was generally agreed that no decision could be made in that respect at that stage, the Commission took note of various suggestions. One suggestion was that the Working Group should consider the preparation of guidelines to assist States with the establishment of a comprehensive legal framework to facilitate the use of electronic commerce. Possible elements of such guidelines could include data protection issues, intellectual property rights and electronic fraud issues. Another suggestion was that the Working Group might re-examine the issue of negotiability and transfer of rights in tangible or intangible goods by electronic means. Yet another suggestion was that the Working Group might need to consider its future role in light of the conclusions to be reached in 2005 by the World Summit on the Information Society (WSIS) convened by the United Nations and the International Telecommunication Union (ITU). One more suggestion noted was that the Working Group could serve as an instrument of cooperation with other Working Groups and with bodies outside UNCITRAL. The Secretariat was requested to consider preparing any relevant study to facilitate discussion by the Commission at its thirty-eighth session, in 2005, on the issue of future work in the area of electronic commerce.

(b) Documentation for the forty-fourth session

35. The Working Group will have before it a newly revised version of the preliminary draft convention, which reflects the deliberations at the Working Group's forty-third session (A/CN.9/WG.IV/WP.110) and a Note by the Secretariat transmitting comments on the final articles of the draft convention by the Treaty Section of the United Nations Office of Legal Affairs (A/CN.9/WG.IV/WP.111).

36. A limited number of the following background documents, which are also available from the UNCITRAL web site (<http://www.uncitral.org>), will be made available at the session:

(a) The reports of the Working Group's thirty-ninth, fortieth, forty-first, forty-second and forty-fourth sessions (A/CN.9/509, A/CN.9/527, A/CN.9/528 and A/CN.9/546, A/CN.9/548 respectively);

(b) The notes by the Secretariat containing the earlier versions of the preliminary draft convention (A/CN.9/WG.IV/WP.95, A/CN.9/WG.IV/WP.100, A/CN.9/WG.IV/WP.103 and A/CN.9/WG.IV/WP.108);

(c) The notes by the Secretariat transmitting comments thereon by an ad hoc expert group established by the International Chamber of Commerce (A/CN.9/WG.IV/WP.96 and A/CN.9/WG.IV/WP.101);

(d) The note by the Secretariat containing a survey of legal barriers to the development of electronic commerce in international instruments relating to international trade (A/CN.9/WG.IV/WP.94);

(e) The notes by the Secretariat transmitting comments on document A/CN.9/WG.IV/WP.94 that were received from member and observer States,

intergovernmental organizations and international non-governmental organizations (A/CN.9/WG.IV/WP. 98 and Add.1 to 6).

6. Adoption of the report

37. The Working Group may wish to adopt, at the close of its session, on Friday, 22 October 2004, a report for submission to the thirty-eighth session of the Commission (to be held in Vienna during the second quarter of 2005).

Notes

¹ United Nations, *Treaty Series*, vol. 1489, No. 25567.

² *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17 (A/55/17)*, paras. 384-388.

³ *Ibid.*, *Fifty-sixth Session, Supplement No. 17 (A/56/17)*, para. 293.

⁴ *Ibid.*, para. 295.

⁵ *Ibid.*, *Fifty-seventh Session, Supplement No. 17 (A/57/17)*, para. 206.

⁶ *Ibid.*, para. 207.

⁷ *Ibid.*, *Fifty-eighth Session, Supplement No. 17 (A/58/17)*, para. 211.

⁸ *Ibid.*, para. 212.

⁹ *Ibid.*, para. 213.

¹⁰ *Ibid.*, para. 214.