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Legal aspects of electronic commerce

Electronic contracting: provisions for a draft convention

Note by the Secretariat

The Secretariat has received comments on the Working Group's consideration of a possible new international instrument on electronic contracting from the Treaty Section of the United Nations Office of Legal Affairs. The text of those comments is reproduced in the annex to this note in the form in which it was received by the Secretariat.

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Annex

Comments from the Treaty Section, Office of Legal Affairs

1. The comments that follow take into account recent developments in the depositary practice of the Secretary-General and also some of the difficulties that have been experienced by the depositary in giving effect to the final clauses of other international agreements. We would like to ensure that this Convention will not contain the same shortcomings that have been problematic elsewhere. We also note that some of the problems that the depositary has faced recently in treaties negotiated in other fora could have been avoided with better drafting. Our comments are intended to make administration easier for the depositary and facilitate more effective implementation by the parties. You will also find the Handbook of Final Clauses, available in hard copy and on the web, useful (http://untreaty-un.org/English/FinalClauses/Handbook.pdf). In light of the above, we make the following specific observations:

Article 15 (Depositary)

2. We note that the Secretary-General is specified in Article 15 in the standard format as depositary. If any administrative duties are added to his functions during the negotiations they should be performed by the Secretary-General in a different capacity. This distinction should be clearly reflected in the Convention.

Article 16 (Procedure for signature and for becoming a party)

3. Is it conceivable that certain international organisations may wish to be party to the Convention? For example, the EC at a future date? It is our understanding that the Convention as it stands will only allow States to become party to it. However, should the negotiators wish to include the participation of international organisations, the entry into force provision, among other provisions, must contain a reference to that effect. It is essential that an international organisation, in addition to treaty-making capacity, possess substantive competence with regard to the matters covered by the Convention. Therefore, consistent with other conventions, e.g., the *Law of the Sea Convention, 1982*, it would be necessary to include a provision that requires an international organisation seeking to become party, to specify the matters governed by the Convention in respect of which competence has been transferred to that international organisation by its member States, and the nature of such competence. Such a declaration should be made at the time of signature or on the consent to be bound being expressed. The provision should also require the international organisation to notify the depositary of any changes of its competence.

4. Furthermore, in the above case, it is important to specify that the participation of such an international organisation shall not confer any rights under the Convention on a member State of that organisation which is not a State party to the Convention. Additionally, the provision should also clarify that participation of an international organisation should not entail an increase in the representation to which its member States which are States Parties would otherwise be entitled, including rights in decision-making. A system for counting the votes may be specified in order to avoid any disagreement over the issue. For a useful precedent,

consider the *Convention on Biological Diversity, 1992*, article 31 (Right to Vote), article 33 (Signature) and article 34 (Ratification, Acceptance or Approval). For example, article 31 (Right to Vote) reads:

> "1. Except as provided for in paragraph 2 below, each Contracting Party to this Convention or to any protocol shall have one vote.
>
> "2. Regional economic integration organizations, in matters within their competence, shall exercise their right to vote with a number of votes equal to the number of their member States which are Contracting Parties to this Convention or the relevant protocol. Such organizations shall not exercise their right to vote if their member States exercise theirs, and vice versa."

5. Regarding the specific date to be inserted in Article 16, for signature, we strongly suggest this date be fixed at least 6 weeks after the text has been finalized and adopted in order to allow the depositary the necessary time to prepare the original text and the certified true copies thereof. We stress that this is a critical requirement of this office. Our experience suggests unnecessary difficulties and waste of resources where a different approach was adopted, especially involving avoidable corrections procedures.

6. It is noted that no location for opening the Convention for signature is specified. In our experience having an initial signature ceremony away from the United Nations Headquarters generally helps to attract high level interest from States. We suggest that should this be envisaged, the ceremonial signature period be limited to two or three days. Thereafter, the treaty should remain open for signature at the United Nations Headquarters for at least twelve months in order to allow States the necessary time to review the text of the Convention and make up their minds on signature. The Legal Counsel has strongly advised against keeping a text open for signature away from United Nations Headquarters for any period of more than a few days (see Section 6(3) of ST/SGB/2001/7).

7. Keeping these points in mind we recommend drafting 16.1 as follows:

> "16.1 This Convention shall be open for signature by [ ] at [location of signature] from [date] to [date], and thereafter at the United Nations Headquarters in New York from [date] to [date]."

Article 17 (Effect in domestic territorial units)

8. It is noted that the overwhelming majority of treaties deposited with the Secretary-General contain no such provision. The *Vienna Convention on the Law of Treaties, 1969*, which codifies customary international law, provides that a treaty is binding upon each party in respect of its entire territory unless a different intention appears from the treaty or is otherwise established. We note that such a provision exists in other UNCITRAL treaties (such as the *United Nations Convention on the Assignment of Receivables in International Trade, 2001*) and those of the Institute for the Unification of Private Law. Should the Working Group insist on retaining this article, we caution that serious complications could arise where a State consists of numerous territorial units (e.g., USA, Canada, China and Australia). This provision could conceivably result in an overload of work for the depositary.

Article 18 (Declarations on exclusions) and article 21 (Reservations)

9. It is noted that the declarations referred to in article 18 (1)-(4) are in fact reservations and should be characterised as such. They should be called reservations due to the problems that unclear terminology usually causes and should be made in writing. We recommend consolidating article 18 (Declarations on exclusions) with article 21 (Reservations) as a new article 18 (Reservations and Declarations). The article should specify that the declaration or reservation in question should be communicated to the depositary. It is a responsibility of the depositary to communicate such actions to other concerned parties. We offer the following draft language for your consideration:

"Article 18. Reservations and declarations

"1. No reservations are permitted except those expressly authorized in this Article.

"2. Any State may declare in writing at the time of deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph l (a) of article 1 of this Convention.

"3. Any State may declare in writing at the time of deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph l (b) of article 1 of this Convention.

"4. Any State may declare in writing at the time of deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph 2 of article 1 of this Convention.

"5. Any State making a reservation in writing under Article 18 (2) (3) or (4) as described above shall not be bound by the matters specified in such reservation."

Article 19 (Communications exchanged under other international conventions)

10. The reference to Contracting States in the second line of paragraph 1 of article 19 is understood to mean those States that have expressed their consent to be bound by the treaty (where the treaty has not yet entered into force or where it has not entered into force for that State). As such it is redundant to include the following language: "... by ratifying, accepting, approving or acceding to this Convention". We suggest that such language be deleted.

11. A declaration (a reservation in fact) made under Article 19(3) must also be made in writing.

Article 20 (Procedure and effects of declarations)

12. This provision is confusing. Unless we are to be the arbiters of endless arguments on whether a statement is a declaration or a reservation, we suggest that this provision be modified. It is suggested that the title of article 20 be modified to read: "*Article 20. Procedure and effects of reservations and declarations*" to take into account both the reservations and declarations contained in articles 17, 18 and 19. Articles 1, 2, 3, and 4 should read "Reservations and Declarations ...".

Amendment procedure

13. It is noted that the Convention does not provide for an amendment procedure. It is our experience that it is useful to provide for an amendment procedure in order to avoid problems of implementation among the States parties in the event of a need to modify the Convention. For additional information on this topic and examples of amendment provisions, please see the *Handbook of Final Clauses of Multilateral Treaties*, prepared by the Treaty Section, pages 97-101, "Amendment".

14. In most multilateral treaties the amendment provision specifies that an amendment proposal be adopted at a conference of States parties provided that the proposal has been circulated to the States parties in advance. In certain instances amendments have been adopted by correspondence. A conference of States parties is usually convened by the Secretariat of a Convention or a relevant administrative body. Such a body could be used to circulate the amendment proposal to the States parties prior to the amendment conference. Once an amendment is adopted, the practice of the Secretary-General as depositary is to circulate the amendments to the States parties.

15. It is usual for multilateral treaties to specify that an amendment proposal be adopted at a conference by a specified proportion of the States parties, e.g., *two-thirds of the States parties*. In such cases it is helpful to specify whether this proportion relates to all the States parties to the Convention or to all States parties present at the time the vote is taken. We make this comment in light of difficulties faced with other treaties containing similar provisions.

16. Multilateral treaties may provide for the entry into force of an amendment only for those States parties that have accepted it. This is the most common approach. However, it is our experience that this approach creates significant problems of interpretation and implementation since it establishes a situation whereby States can be parties to two different regimes under a single convention. For example, see the *Convention on the Rights of the Child, 1989*. This situation has also occurred in relation to the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 1989*, where a newly adopted Annex would be applicable only to the States parties which have accepted it. In order to avoid the creation of different regimes under this Convention, we strongly suggest avoiding provisions which enable only States parties which have accepted an amendment to be bound by it while other States parties remain under a different regime. For additional guidance on this topic, please see the *Handbook of Final Clauses of Multilateral Treaties*, pages 67-75 "Entry into force of annexes, amendments and regulations".

17. We offer the following model as a guideline:

> "Any State Party may propose amendments to the Convention. Proposed amendments shall be submitted in writing to [the Secretariat of the Convention or other administrative entity], which shall circulate the proposal to all States parties. A conference of States parties, convened to consider the amendment proposal, shall discuss the proposed amendments, provided that the proposals have been circulated to the States parties at least [90] days in advance.
>
> "Amendments shall be adopted by [consensus, two-thirds, etc.] of the States parties present at the conference of States parties, and shall enter into force for

all States parties on the date on which [22, etc.] States parties have deposited their instruments of acceptance thereof."

18. Many multilateral treaties provide for an amendment to enter into force once a specified proportion of the States parties, e.g. "two-thirds of the States parties", have deposited their instruments of acceptance. We have recently dealt with problems in this area where the question has arisen as to whether the number of acceptances is calculated on the basis of the number of States parties at the time of adoption of the amendment or at the time of its acceptance. We suggest clarifying this issue at the outset in order to avoid future confusion. However, please note that when a treaty is silent on this matter, the practice of the Secretary-General as depositary is to calculate the number of acceptances on the basis of the number of States parties to the Convention at the time of acceptance. A solution, which we strongly recommend, is to refer to a specified number of States parties depositing their instruments of acceptance, e.g., "22 States parties" as the entry into force requirement (see the model above).

Institutional structure

19. We note that there is no institutional structure to provide secretariat functions under the Convention. This is especially relevant for administrative functions, such as the circulation of proposed amendments prior to a meeting of the States parties at which the amendment may be adopted. The depositary does not perform such administrative functions. It would be appropriate to specify the entity which will discharge such administrative functions.

20. The Treaty Section remains ready to assist in matters relating to final clauses and other treaty law matters. We would invite your office to be in touch with the Treaty Section as negotiations progress. In this connection, it is noted that you will need to provide the Treaty Section with camera-ready copies of the Convention, as adopted (hard copy and electronic format—Microsoft Word 2000).