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Draft convention on the use of electronic communications in international contracts

Compilation of comments by Governments and international organizations

Addendum

Contents

	<i>Page</i>
II. Compilation of comments.....	2
A. States	2
2. Spain	2



II. Compilation of comments

A. States

2. Spain

[Original: Spanish]

[9 March 2005]

1. Article 1, paragraph 1. The Secretariat's suggestion that the article should contain a reference to an "agreement", as well as to a "contract", as being included in the scope of application should be accepted.

2. Article 4 (c) (the definition of "data message"). If the intention is to reproduce the definition contained in the UNCITRAL Model Law on Electronic Commerce, the draft text is true to the English version but not to the Spanish: the latter includes the word "*comunicada*", for which there is no equivalent in the English text.

3. Article 6, paragraph 2 (Location of the parties). As suggested by the Secretariat, it would be appropriate to delete the words in square brackets, since the circumstances implied by the provision (where a party has not indicated a place of business) excludes the option of the text in square brackets.

4. Article 6, paragraph 3 (Location of the parties). The provision states that if a natural person does not have a place of business, reference is to be made to the person's habitual residence. In the Spanish text, it might be more accurate, from the purely legal point of view, to replace the words "*se tendrá en cuenta*" ("account shall be taken") by the phrase "*se considerará como tal*" ("shall be considered as such"). The point at issue is not so much to "take into account" the person's habitual residence as to establish that such residence is considered to be the place of business in a given case.

5. Article 9, paragraph 6, concerning non-applicability of the convention with regard to the originals of letters of credit or bank guarantees. This reference in article 9 to a specific area of non-applicability should be deleted. As stated in the note by the Secretariat, a State wishing to establish non-applicability in specific cases may do so under article 18, paragraph 2. As a last resort, if it is wished to establish a general exclusion of applicability, such exclusion should appear in article 2 (Exclusions), paragraph 2, in the same way as such exclusions as bills of exchange, promissory notes, consignment notes and so on.

Paragraph 6, which appears in square brackets, is inconsistent with the general approach adopted by the convention, which is to provide for wider applicability (art. 1, para. 1) but to give States the option of establishing specific exclusions (art. 18, para. 2). The general exclusions in the convention itself (art. 2) have been reduced to a minimum; and there is a compelling reason for each exclusion.

6. Article 19 bis (Procedure for amendments to article 19, paragraph 1). This provision is redundant and therefore need not be retained. Its content has already appeared in article 19, paragraphs 2, 3 and 4, and in article 22 (Amendments).

7. Submission of instruments to the depositary "in writing" (art. 20, paras. 2 and 4, and art. 25, para. 1). It might be as well to state explicitly in the commentary

that, despite the fact that the convention accepts an electronic communication where a communication in writing is required, written notifications to the depositary should be made on paper; the principle of equivalent functions, as provided for in article 9, paragraph 2, should not be applied in this case.

8. Article 22 (Amendments). Variant B is preferable, as being more complete.
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