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Draft Convention on the Use of Electronic Communications in International Contracts

Compilation of comments by Governments and international organizations

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II. Compilation of comments

B. Intergovernmental organizations

1. Permanent Bureau of the Hague Conference on Private International Law

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I. Private international law issues

In light of the mandate of the Hague Conference “to work for the progressive unification of private international law rules” the Permanent Bureau has closely examined the references to private international law which are contained in the draft Convention on the Use of Electronic Communications in International Contracts (hereinafter “E-Contracting Convention”) and the Note by the Secretariat (A/CN.9/577/Add.1; hereinafter “Note”).

The Convention will apply to the use of electronic communications in connection with the formation or performance of a contract between parties whose places of business are in different States (article 1 (1)). It does not require that both parties be located in Contracting States (Note, paragraph 28).

The following comments assume that there is a contract, which falls within the scope of the Convention. One party then files suit.

1. The court seized is located in a non-Contracting State.

One party seizes the court of a *non-Contracting State*. It seems that the UNCITRAL Working Group wanted this court to look into the private international law rules of the State in which it is located, and if these rules designate the substantive law of any State Party to the E-Contracting Convention, the latter will be applied (see Note, paragraph 32), regardless of the fact that the State of the court seized is not a Party to the E-Contracting Convention. Part of the substantive law to be applied then is the E-Contracting Convention. According to its article 1 (1), this Convention will apply whenever the parties’ places of business are in different States.

2. The court seized is located in a Contracting State.

(a) If one party seizes the court of a *Contracting State*, one possibility to come to the application of the Convention is that this court would equally look into the private international law rules of the State in which it is located. If these rules designate the substantive law of this State or of any other State Party to the E-Contracting Convention, the latter will be applied (see Note, paragraph 32).

(b) However, another possibility for the court of a *Contracting State* to apply the Convention seems to be—similar to the rule in article 1 (1)(a) of the United Nations Sales Convention—that the Convention claims application in any international case (i.e. where the parties have their place of business in different States), even where the law of a non-Contracting State applies. The Note states that this is the case for the United Nations Sales Convention and explains why the

requirement for the parties' place of business to be in a **Contracting** State has been dropped (paragraphs 28-32). So it can be assumed that the rest still stands. This order contained in the Convention to apply it regardless of the (otherwise) applicable law can only be given to a court of a Contracting State. If a Contracting State wants to avoid having to apply the Convention even in cases where the applicable law is that of a non-Contracting State, it has to make a declaration under article 18 (1)(b) of the E-Contracting Convention "that it will apply this Convention only (...) when the rules of private international law lead to the application of the law of a Contracting State". Thus, except in the case of declaration under article 18 (1)(b), the Convention covers all international cases (in the sense of article 1 [1]) without any need for an argument basing its application on the application of the substantive law of a Contracting State.

3. Conclusion

Paragraphs 28-32, first sentence of the Note and the existence of article 18 (1)(b) seem to confirm that in the absence of such a declaration, the E-Contracting Convention applies if either (a) the forum State itself is Party to the E-Contracting Convention, regardless of the *lex causae*, or (b) where the law designated by the private international law rules of the forum is the law of a Contracting State (which is only relevant if the court is not located in a Contracting State). However, we note that this conclusion is inconsistent with paragraph 32 of the Note which reads: "It is recognized that in its present form, the draft convention applies when the law of a Contracting State is the law applicable to the dealings between the parties, which is to be determined by the rules on private international law of the forum State, if the parties have not chosen the applicable law."

What is said in paragraph 32 of the Note is correct for the court of a non-Contracting State, but in light of article 18 (1)(b) and the explanations in the Note concerning the deletion of the requirement for the parties to have their place of business in different **Contracting** States, it would seem not to be correct for the court of a Contracting State. Such court would also have to apply the Convention if the law of a non-Contracting State applies, as long as the parties have their places of business in different States.

II. Scope of Application of the Draft Convention on the Use of Electronic Communications in International Contracts and its possible impact on Hague Conventions

The Permanent Bureau has carried out a survey of all existing Hague Convention with a view to identifying requirements of written form that could be affected by the E-Contracting Convention (see the note by Andrea Schulz and Nicola Timmins, "The Effect of the UNCITRAL Draft Convention on Electronic Communications in International Contracts on the Hague Conventions", Preliminary Document No. 31, March 2005, available at www.hcch.net under "Work in Progress"—"General Affairs"). The survey identified one Hague Convention likely to be affected by the E-Contracting Convention and where the "functional equivalent-rule" established by article 9 (2) and (3) might be incompatible with the spirit of the Hague Convention. This concerns the Hague Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes. It is not

clear, however, whether matrimonial property contracts under this Convention would be covered by the E-Contracting Convention. This is due to some ambiguity as to both the positive scope of application of the latter and the explicit exclusions from its scope.

1. Positive Scope of Application of the E-Contracting Convention

The Convention will apply to the use of electronic communications in connection with the formation or performance of a contract between parties whose places of business are in different States (article 1 (1)). If a natural person does not have a place of business, reference is to be made to the person's habitual residence (article 6 (3)). Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of the Convention (article 1 (3)).

This suggests that according to its article 1, the Convention applies to all sorts of contracts, regardless of their subject matter, except insofar as some of these subject matters are excluded from its scope by article 2. Accordingly, a matrimonial property contract would per se be included. On the other hand, paragraph 10 of the Note states that: "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." Although the focus of this statement is on the means of communication used, it seems to be based on the assumption that the Convention would apply to *commercial* contracts only. Paragraph 58 of the Note states that "The Working Group hopes that States may find the draft convention useful to facilitate the operation of other international instruments—*essentially trade-related ones*". This self-restraint seems logical in light of UNCITRAL's mandate "to further the progressive harmonization and unification of the law of international trade". Neither the text of the draft Convention text itself nor paragraph 26 of the Note, however, reflect this self-restraint. In order to avoid any doubt (and any resulting confusion concerning the need to make a declaration under article 19) the Permanent Bureau would prefer a clear statement in the explanatory report which clarifies that the Convention covers only commercial or trade-related contracts.

2. Exclusions from scope

We think that such a clarification is a valid alternative to an additional exclusion in article 2 for "Contracts governed by family law or by the law of succession". Without at least such a clarification in the explanatory report, the present exclusion of "Contracts concluded for personal, family or household purposes" in article 2 (1)(a), is not sufficient to avoid confusion. While the language as such could in principle be used to exclude matrimonial property contracts from the scope of the E-Contracting Convention, this language—which was initially used in the United Nations Sales Convention—is commonly understood as referring to "consumer contracts" (see paragraph 33 of the Note). Paragraph 35 of the Note accordingly dwells on consumers purchasing goods and states that the Working Group agreed that these cases should be completely excluded from the reach of the draft Convention. In other words, the narrow positive scope of the United Nations Sales Convention (sale of goods) has also narrowed the meaning of the terms

“contracts concluded for personal, family or household purposes” in the common understanding.¹

3. Article 19

The Permanent Bureau appreciates the sophisticated mechanism of general opt-out (article 19 (2) at the end), opt-out for specific conventions (article 19 (4)) and, following a general opt-out, a re-opt-in for specific conventions (article 19 (3)). This article provides flexibility for States Parties to conventions, which clearly fall within the scope of the E-Contracting Convention. Concerning the Hague Convention on Matrimonial Property Regimes mentioned above, however, this article is not sufficient to ensure that the E-Contracting Convention does not apply to it, and could lead to fragmentation in the application of this Hague Convention which would be inconsistent with its terms and spirit.

¹ Including that of other international organizations, such as the Hague Conference on Private International Law. *cf.* article 2, paragraphs 1 (*a*) and 2, of the preliminary draft Convention on Exclusive Choice of Court Agreements.