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Draft Convention on the Use of Electronic Communications in International Contracts

Compilation of comments by Governments and international organizations

Addendum

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II. Compilation of comments

B. Intergovernmental organizations

4. International Institute for the Unification of Private Law (Unidroit)

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[18 May 2005]

The draft *UNCITRAL Convention on the Use of Electronic Communications in International Contracts* deals with a number of issues raised by the use of electronic communications in the context of international conventions. A majority of existing conventions were adopted before electronic communication became an accepted way of communicating, or indeed had been developed at all. The issues considered include the requirement of contracts being signed or in writing, the time of dispatch and the time of receipt.

In most cases the instruments adopted by Unidroit deal only marginally with requirements as to the form of a contract or agreement (in most instances merely to exclude any such requirement).

Electronic communications have only in recent years come to the fore and were therefore not contemplated by Unidroit instruments adopted before 2001. The definitions given by the conventions of “writing” are however broad enough to cover also electronic documents. This can clearly be seen in the table appended to this document. This table reproduces the relevant texts with a comment, where necessary. As can be seen from the wording of the provisions cited, the draft *UNCITRAL Convention* would effectively complement the text of the Unidroit instruments by permitting the use of electronic means of communication to fulfil any requirement of a written document, where applicable. Where no such requirement is specified, the draft effectively makes it possible for electronic communications to be accepted without doubt.

Of the draft instruments presently under consideration at Unidroit, the *preliminary draft Protocols to the Cape Town Convention on International Interests in Mobile Equipment on matters relating to railway rolling stock and space assets* state explicitly that the definitions in the Convention apply also to the protocols, which effectively means that electronic communications are covered.

The *preliminary draft Convention on Harmonised Substantive Rules regarding Securities held with an Intermediary* does not refer to “writing” as such, even if it refers to specific agreements, to instructions given by the account holder to the intermediary, etc., stating however that they are not subject to any form requirement under the draft Convention. The project on *Transactions on transnational and connected capital markets* has a number of parts. One of these is the development of harmonised or uniform substantive rules applicable to so-called “de-localised” transactions. Such de-localisation may be the consequence of mergers between markets located in different jurisdictions or may be technologically induced where “Electronic Communications Networks” (ECNS) are used for trading and even initial offerings of securities. When work on this item is started, it will clearly be seen that the use of modern technologies to all intents and purposes is the most important part.

Appendix

Unidroit instruments and form or writing requirements

(A) Instruments already adopted

<i>Instrument</i>	<i>Article</i>	<i>Text of provision</i>	<i>Comment</i>
Convention relating to a Uniform Law on the International Sale of Goods (ULIS) (The Hague, July 1, 1964)	Art. 15	“A contract of sale need not be evidenced by writing and shall not be subject to any other requirements as to form. In particular, it may be proved by means of witnesses.”	Following the adoption of the <i>UN Convention on Contracts for the International Sale of Goods (CISG)</i> the interest of the two uniform sales laws is more of a historic nature. If the terms of ULIS are considered, however, Article 15 states explicitly that a contract of sale need not be in writing. Electronic contracts should therefore be covered. This provision should be compared with Article 11 CISG – the Uniform Law does not contain any provision similar to Article 12 CISG.
Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (ULFC) (The Hague, 1 July 1964)	Art. 3	“An offer or an acceptance need not be evidenced by writing and shall not be subject to any other requirement as to form. In particular, they may be proved by means of witnesses.”	Article 3 of ULFC states explicitly that neither an offer, nor an acceptance need be in writing. Furthermore, Article 6(1) states that: “[a]cceptance of an offer consists of a declaration communicated by any means whatsoever to the offeror.” The words “by any means whatsoever” would appear to be sufficient to cover new means of communication. Again, the provision can be compared to Article 11 CISG.
Convention providing a Uniform Law on the Form of an International Will (Washington, D.C., 1973)	Art. 3	“1. The will shall be made in writing. 2. It need not be written by the testator himself. 3. It may be written in any language, by hand or by any other means.”	Whether or not instruments dealing with family law or succession should be included in the scope of application of the draft UNCITRAL Convention is debatable. However, assuming that at least a selection of the instruments should be included, the following may be stated as regards the 1973 Uniform Law on the Form of an International Will.

<i>Instrument</i>	<i>Article</i>	<i>Text of provision</i>	<i>Comment</i>
			<p>The Wills Uniform Law states explicitly that the will shall be in writing, although no definition of writing is provided. The Explanatory Report states that: “The Uniform Law does not explain what is meant by “writing”. This is a word of everyday language which, in the opinion of the Law’s authors, does not call for any definition but which covers any form of expression made by signs on a durable substance” (J.P. Plantard, <i>Explanatory Report on the Convention providing a Uniform Law on the Form of an International Will</i>, in <i>Uniform Law Review</i>, 1974 I, 121 – 123). Not surprisingly, considering when it was written, commenting on para. (3) the Explanatory Report indicates that what the drafters had in mind when they spoke of “by any other means” was a typewriter (<i>Ibid.</i>). These words may however easily apply also to electronic means.</p>
<p>Convention on Agency in the International Sale of Goods (Geneva, 17 February 1983)</p>	Art. 10	<p>“The authorisation need not be given in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.”</p>	<p>The Explanatory Report states that it was decided not to better define what is intended by writing to leave businessmen the maximum freedom. Although the possibility was considered of including a provision similar to Article 13 CISG, it was decided not to, “since the model in the Vienna Convention had not made full allowance for more modern forms of communications, for example, where information appears on a screen but is subsequently erased” (M. Evans, <i>Convention on Agency in the International Sale of Goods (Geneva, 15 February 1983): Explanatory Report</i>, in <i>Uniform Law Review</i> 1984 I, 115).</p>

<i>Instrument</i>	<i>Article</i>	<i>Text of provision</i>	<i>Comment</i>
	Art. 11	“Any provision of Article 10, Article 15 of Chapter IV which allows an authorization, a ratification or a termination of authority to be made in any form other than in writing does not apply where the principal or the agent has his place of business in a Contracting State which has made a declaration under Article 27. The parties may not derogate from or vary the effect of this paragraph.”	Article 11 was introduced principally at the request of the socialist States which required all acts relating to foreign trade concluded by their economic organisations to be made in writing (M. Evans, <i>cit.</i> 115 – 117). Article 27 states that “A Contracting State whose legislation requires an authorization, ratification or termination of authority to be made in or evidenced by writing in all cases governed by this Convention may at any time make a declaration in accordance with Article 11 that any provision of Article 10, Article 15 or Chapter IV which allows an authorization, ratification or termination of authority to be other than in writing, does not apply where the principal or the agent has his place of business in that State.”
UNIDROIT Convention on International Factoring (Ottawa, 28 May 1988)	Art. 1(4)(a) - (c)	<p>“4. - For the purposes of this Convention:</p> <p>(a) a notice in writing need not be signed but must identify the person by whom or in whose name it is given;</p> <p>(b) "notice in writing" includes, but is not limited to, telegrams, telex and any other telecommunication capable of being reproduced in tangible form;</p> <p>(c) a notice in writing is given when it is received by the addressee.”</p>	<p>Art. 1(4)(b) states explicitly that “notice in writing” includes, but is not limited to, “any other telecommunication capable of being reproduced in tangible form”, which would permit the inclusion also of electronic means.</p> <p>The draft UNCITRAL Convention considers both the question of identification of the party (Art. 9(3)(a)), and that of the time of receipt (Art. 10(2)), which would appear to complement the Factoring Convention.</p>
	Art. 3(1)(b)	<p>“1. - The application of this Convention may be excluded:</p> <p>(a) ...</p> <p>(b) by the parties to the contract of sale of goods, as regards receivables arising at or after the time when the factor has been given notice in writing of such exclusion.”</p>	

<i>Instrument</i>	<i>Article</i>	<i>Text of provision</i>	<i>Comment</i>
	Art. 8(1)	<p>“1. - The debtor is under a duty to pay the factor if, and only if, the debtor does not have knowledge of any other person's superior right to payment and notice in writing of the assignment:</p> <p>(a) is given to the debtor by the supplier or by the factor with the supplier's authority;</p> <p>(b) reasonably identifies the receivables which have been assigned and the factor to whom or for whose account the debtor is required to make payment; and</p> <p>(c) relates to receivables arising under a contract of sale of goods made at or before the time the notice is given.”</p>	
	Art. 9(2)	<p>“2. - The debtor may also assert against the factor any right of set-off in respect of claims existing against the supplier in whose favour the receivable arose and available to the debtor at the time a notice in writing of assignment conforming to Article 8(1) was given to the debtor.”</p>	
Convention on International Interests in Mobile Equipment (Cape Town, 2001)	Art. 1(nn)	<p>““writing” means a record of information (including information communicated by teletransmission) which is in tangible or other form and is capable of being reproduced in tangible form on a subsequent occasion and which indicates by reasonable means a person's approval of the record.”</p>	<p>The definition contained in this provision already refers to “teletransmission” and therefore includes electronic means of communication, as is clear from the Commentary which refers to “electronic and other forms of teletransmission” (R. Goode, <i>Convention on International Interests in Mobile Equipment and Protocol thereto on Matters specific to Aircraft Equipment Official Commentary</i>, Rome 2002, 58).</p>

<i>Instrument</i>	<i>Article</i>	<i>Text of provision</i>	<i>Comment</i>
	Art. 7(a)	<p>“An interest is constituted as an international interest under this Convention where the agreement creating or providing for the interest:</p> <p>(a) is in writing;</p> <p>.....”</p>	
	Art. 8(4)	<p>“4. A chargee proposing to sell or grant a lease of an object under paragraph 1 shall give reasonable prior notice in writing of the proposed sale or lease to:</p> <p>(a) interested persons specified in Article 1(m)(i) and (ii); and</p> <p>(b) interested persons specified in Article 1(m)(iii) who have given notice of their rights to the chargee within a reasonable time prior to the sale or lease.”</p>	
	Art. 11(1)	<p>“1. The debtor and the creditor may at any time agree in writing as to the events that constitute a default or otherwise give rise to the rights and remedies specified in Articles 8 to 10 and 13.”</p>	
	Art. 15	<p>“In their relations with each other, any two or more of the parties referred to in this Chapter may at any time, by agreement in writing, derogate from or vary the effect of any of the preceding provisions of this Chapter except Articles 8(3) to (6), 9(3) and (4), 13(2) and 14.”</p>	
	Art. 20(1) - (3)	<p>“1. An international interest, a prospective international interest or an assignment or prospective assignment of an international interest may be registered, and any such registration amended or extended prior to its expiry, by either party with the consent in writing of the other.</p>	

<i>Instrument</i>	<i>Article</i>	<i>Text of provision</i>	<i>Comment</i>
		<p>2. The subordination of an international interest to another international interest may be registered by or with the consent in writing at any time of the person whose interest has been subordinated.</p> <p>3. A registration may be discharged by or with the consent in writing of the party in whose favour it was made.”</p>	
	Art. 31(4)	“4. The debtor may at any time by agreement in writing waive all or any of the defences and rights of set-off referred to in the preceding paragraph other than defences arising from fraudulent acts on the part of the assignee.”	
	Art. 32(1)(a)	<p>“1. An assignment of associated rights transfers the related international interest only if it:</p> <p>(a) is in writing;</p> <p>.....”</p>	
	Art. 33(1)(a)	<p>“1. To the extent that associated rights and the related international interest have been transferred in accordance with Articles 31 and 32, the debtor in relation to those rights and that interest is bound by the assignment and has a duty to make payment or give other performance to the assignee, if but only if:</p> <p>(a) the debtor has been given notice of the assignment in writing by or with the authority of the assignor;</p> <p>.....”</p>	
	Art. 38(2)	“2. The priority between any interest within the preceding paragraph and a competing interest may be varied by agreement in writing between the holders of the respective interests but an assignee of a subordinated interest is not	

<i>Instrument</i>	<i>Article</i>	<i>Text of provision</i>	<i>Comment</i>
		bound by an agreement to subordinate that interest unless at the time of the assignment a subordination had been registered relating to that agreement.”	
	Art. 42(2)	“2. Any such agreement shall be in writing or otherwise concluded in accordance with the formal requirements of the law of the chosen forum.”	
Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment (Cape Town, 2001)	Art. IV(3)	“3. The parties may, by agreement in writing, exclude the application of Article XI and, in their relations with each other, derogate from or vary the effect of any of the provisions of this Protocol except Article IX (2)-(4).”	Article I(1) of the Protocol states explicitly that, except where the context otherwise requires, terms used in it have the meaning set out in the Convention. Thus, “writing” includes also electronic communications.
	Art. V(1)(a)	“1. For the purposes of this Protocol, a contract of sale is one which: (a) is in writing; ”	
	Art. IX(2) and (6)	“2. The creditor shall not exercise the remedies specified in the preceding paragraph without the prior consent in writing of the holder of any registered interest ranking in priority to that of the creditor. 6. A chargee proposing to procure the de-registration and export of an aircraft under paragraph 1 otherwise than pursuant to a court order shall give reasonable prior notice in writing of the proposed deregistration and export to: (a) interested persons specified in Article 1(m)(i) and (ii) of the Convention; and (b) interested persons specified in Article 1(m)(iii) of the Convention who have given notice of their	

<i>Instrument</i>	<i>Article</i>	<i>Text of provision</i>	<i>Comment</i>
		rights to the chargee within a reasonable time prior to the de-registration and export.”	
	Art. X(5)	“5. The creditor and the debtor or any other interested person may agree in writing to exclude the application of Article 13(2) of the Convention.”	
	Art. XIII(3)	“3. The person in whose favour the authorisation has been issued (the “authorised party”) or its certified designee shall be the sole person entitled to exercise the remedies specified in Article IX(1) and may do so only in accordance with the authorisation and applicable aviation safety laws and regulations. Such authorisation may not be revoked by the debtor without the consent in writing of the authorised party. The registry authority shall remove an authorisation from the registry at the request of the authorised party.”	
	Art. XV	“Article 33(1) of the Convention applies as if the following were added immediately after subparagraph (b): “and (c) the debtor has consented in writing, whether or not the consent is given in advance of the assignment or identifies the assignee.””	
	Art. XXII(2)	“2. A waiver under the preceding paragraph must be in writing and contain a description of the aircraft object.”	
Model Franchise Disclosure Law (2002)	Article 4(1)	“Disclosure must be provided in writing”.	The Explanatory Report to the Model Franchise Disclosure Law specifies why it is desirable for disclosure to be made in writing. It also states that it must not necessarily be paper-based, and refers to the <i>UNCITRAL Model Law on Electronic Commerce</i> .

<i>Instrument</i>	<i>Article</i>	<i>Text of provision</i>	<i>Comment</i>
			Considering its nature of a model, the proviso is of course added that it will depend on the State concerned whether or not disclosure by electronic means is acceptable (see <i>Model Franchise Disclosure Law</i> , Rome 2002, p. 37 – 38)
Principles of International Commercial Contracts 2004	Art. 1.2	“Nothing in these Principles requires a contract, statement or any other act to be made in or evidenced by a particular form. It may be proved by any means, including witnesses.”	In the 2004 Principles a number of provisions were slightly amended to ensure that the needs of electronic commerce were covered. The provisions therefore speak of “form” rather than “writing”.
	Art. 2.1.18	“A contract in writing which contains a clause requiring any modification or termination by agreement to be in a particular form may not be otherwise modified or terminated. However, a party may be precluded by its conduct from asserting such a clause to the extent that the other party has reasonably acted in reliance on that conduct.”	
	Art. 2.1.8	“A period of acceptance fixed by the offeror begins to run from the time that the offer is dispatched. A time indicated in the offer is deemed to be the time of dispatch unless the circumstances indicate otherwise.”	

(B) Conventions under preparation

<i>Convention</i>	<i>Article</i>	<i>Text of Provision</i>	<i>Comment</i>
Preliminary draft protocol on matters specific to railway rolling stock	III	“In their relations with each other, the parties may by agreement in writing, derogate from or vary any of the provisions of this Protocol except Article VII(2).”	Article I(1) of the preliminary draft Protocol states explicitly that, except where the context otherwise requires, terms used in it have the meaning set out in the Convention. Thus, “writing” includes also electronic communications.
	XI	“Article 33(1) of the Convention applies as if the following were added immediately after sub-paragraph (b): “and (c) the debtor has not been given prior notice in writing of an assignment in favour of another person”.	
	XIX(2)	“2. A waiver under the preceding paragraph must be in writing and contain a description of the railway rolling stock as specified in Article V of this Protocol.”	
Preliminary draft protocol on matters specific to space assets	IV	“The parties may, by agreement in writing, exclude the application of Article XI and, in their relations with each other, derogate from or vary the effect of any of the provisions of this Protocol except Article IX(2) -(3).”	Article I(1) of the preliminary draft Protocol states explicitly that, except where the context otherwise requires, terms used in it have the meaning set out in the Convention. Thus, “writing” includes also electronic communications.
	V(1)(a)	“1. – For the purposes of this Protocol, a contract of sale is one which: (a) is in writing; ”	
	X(5)	“[5. – The creditor and the debtor or any other interested person may agree in writing to exclude the application of Article 13(2) of the Convention.]”	

<i>Convention</i>	<i>Article</i>	<i>Text of Provision</i>	<i>Comment</i>
	XIV	<p>“Article 33(1) of the Convention applies with the following being added immediately after subparagraph</p> <p>(b):</p> <p>“and (c) the debtor has consented in writing, whether or not the consent is given in advance of the assignment or identifies the assignee.””</p>	
	XX(2)	<p>“2. – A waiver under the preceding paragraph must be in writing and contain a description, in accordance with Article VII, of the space asset.”</p>	
Preliminary Draft Convention on Harmonised Substantive Rules regarding Securities held with an Intermediary			<p>A number of provisions speak of “agreement”, but there is no requirement that the agreement be in writing. Indeed, the Explanatory Notes to the preliminary draft Convention specifies that there are no form requirements as regards account agreements (see the note to Article 1(1)(e), Study LXXVIII - Doc. 19 p. 23).</p>