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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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A. States

10. United States of America

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1. We generally support the revised text of the draft Convention on the Use of Electronic Messages in international contracts (A/CN.9/577), subject to the recommendations below and to such drafting and other recommendations as may be made at the Plenary. We believe that the Commission's Working Group IV on Electronic Commerce has done an effective job of developing wide support amongst States for the draft convention, which will establish common basic rules to facilitate and validate electronic commerce between widely separated markets with differing legal regimes, thus linking many paths to world trade and domestic development. The convention system would not require anyone to use or accept electronic messages and recognizes party autonomy by protecting the right of parties to vary the substantive provisions of the treaty, as well as protecting government agencies' needs to determine the appropriate methods for conduct of public matters.

2. The convention would also facilitate application of existing treaties and other international instruments to the extent that States wish to do so. While electronic commerce has become integral to many national economies, it is still too early in its development to apply rules without allowing States to adjust that application in various sectors or with regard to particular transactions or practices or otherwise to meet their economic needs. Thus, in addition to exclusions in article 2, States would be able to exclude other matters under articles 18 and 19.

3. Our comments fall into two groups. The first group relates to Chapters I-III and articles 18 and 19 of Chapter IV of the draft convention, which have been substantially reviewed by the Working Group, so our comments are limited to several matters which, given further consultations, we believe should be clarified in the commentary or modified. The second group of comments deals with those provisions of Chapter IV on which the Working Group did not conclude its work.

Articles 1 and 19 (scope)

4. We support the broad application promoted by both articles, which States can limit as appropriate by declaration.

Article 3 (party autonomy)

5. We support the recognition of party autonomy, including the understanding that the article as drafted encompasses variation of terms by implication, such as by contract terms at variance with the transactional provisions of the convention. While some have felt that this critical aspect should be set out in the black letter terms, others have felt that the language should not vary from the Vienna Convention on contracts for the international sale of goods (CISG), and believe that the desired result is necessarily drawn from that language. We believe that a clear statement in the commentary is needed reflecting this understanding so as to provide necessary

transactional certainty, or alternatively the words “explicitly or implicitly” should be inserted after the word “derogate”, if statutory clarification is preferred.

Article 6, paragraph (2) (“location”)

6. Paragraph 1 provides a location rule where a party has indicated its location; paragraph 2 is intended to apply where there is no such indication. As drafted, neither paragraph would cover cases where there is no indication of location, but the party has only one place of business as defined in article 4. Deleting the clause in the first line of paragraph (2) “and has more than one place of business” as well as deleting the bracketed language that follows that will correct the problem.

Article 9, paragraphs 4 and 6 (originality)

7. Application of the convention’s terms to letters of credit, direct demand guarantees and similar undertakings needs to be adjusted. Replacing the term “presented” in the chapeau and subparagraph (b), which can have specific meaning in those areas of practice, with “made available” will avoid the implication that e-documents can be presented to support payment where not so authorized by the terms of the letter of credit or demand guarantee or other independent undertaking. This change, together with a clear statement in the commentary as to its intended effect, may make retention of paragraph (6), now in brackets due to lack of time to conclude deliberations on it at the last meeting of the Working Group, no longer necessary.

8. To assure that the expected results are reached, the language in article 2, paragraph 2 should be clarified in the commentary that undertakings such as letters of credit, stand-bys and demand guarantees, as distinct from documents to be presented under them for payment, are not excluded by article 2.

Article 10, paragraph 2, rules on receipt

9. Paragraph (2) embodies compromise language which was to assure that the “capable of being retrieved” standard under the first sentence is subject to a rebuttable presumption under the final sentence of paragraph 10 (2), and that deployment of reasonable security protection would be available to rebut a conclusion that receipt had occurred. Many States that concurred in the compromise language felt that that result necessarily flowed from the provisions of this paragraph as drafted. We on the other hand, along with some States, had preferred statutory confirmation.

10. Because of the criticality of this rule, at a time when e-message systems are increasingly managed with security mechanisms which regulate the flow of incoming electronic messages due to mounting concerns worldwide about viruses, spam and a variety of invasive content embedded in incoming data, the result intended should be confirmed by a clear commentary.

Article 14 (error correction involving certain automated transactions)

11. We believe that the right to avoid or withdraw an input error should be limited to that error, rather than be applied to the message in its entirety. This change will leave unaffected portions of a message which are not subject to an obligation to

provide error correction, and which a sender should not therefore have an option to withdraw from.

Chapter IV provisions

Article 16 (period for signature)

12. We recommend that the period be three (3) years so as to provide ample time for States to take that action and thus promote the convention.

Article 19 (application to other treaties)

13. We support the purpose of this article and related provisions, which provide a treaty mechanism for States to enhance application of existing international agreements by applying modern e-commerce rules, where those are consistent with the intent and expected results of those treaties. As drafted, no State is required to apply these rules to other treaties, but may do so either by option in or option out techniques, and can make further adjustments by declaration under article 18 (4).

Article 20 (application of declarations)

14. We support the article generally. International private law conventions have since the 1970s employed treaty-authorized declarations which adjust particular provisions only as to that State. These are not reservations as that term is used in the Vienna Convention on the law of treaties, but treaty authorized adjustments which do not give rise to reciprocal actions. Notice of formal declarations and rules on when their terms apply to transactions is important for commercial predictability.

Paragraph (1)

15. The reference to article 17 should be consistent with that article, i.e. a declaration under that article can be made only at the time of ratification, accession, etc., although it may be amended thereafter. All other declarations should be able to be made and amended at any time.

Paragraph (3)

16. We have no objection to the usual six-month time period. The Commission may want to note that in order to assure timely application of the convention to commercial transactions, receipt of declarations and their content can be made available promptly by e-notice either by the Depositary or another unit such as the Trade Law Branch.

Article 22 (amendments and functions of the Commission)

17. Under existing practices in international private law, changes to concluded texts are usually produced by the same multilateral formulating bodies, acting through their general membership, and not only States party to a particular treaty (although State parties can also always agree to amendments inter se). UNCITRAL, for example, amended its first Convention (the 1974 Convention on the Limitation Period in the International Sale of Goods) not by action of the States parties but by the Commission elaborating a 1980 amending Protocol to the Convention, which applies to States that adopt it by ratification.

18. Article 22 is therefore unnecessary. If retained however, proposed Alternative (B) is consistent with existing practices of the Commission (Paragraph (3) of variant B should refer to approval by the General Assembly upon recommendation of the Commission). Alternative (A) is unnecessary in any event since States parties could in all cases amend provisions as between themselves. It would add a level of complexity not previously incorporated in private law conventions, and absent actual significant problems in the field of private international law, which we believe do not exist, should not be included.

Article 23 (entry into force)

19. We believe the convention should come into force upon the ratification of the first three (3) States. This in keeping with the modern trend in commercial law conventions, which promote their application as early as possible to those States that seek to apply such rules to their commerce. There is no need to have widespread adoption before application, and bringing the convention into force at the earliest opportunity will promote its use.

Article 24 (transition provisions)

20. We believe this is a very important article, because commercial transaction practice requires a significant level of predictability as to rules that would apply. Without the addition of paragraphs (2) to (5), there would be substantial uncertainty as to how paragraph (1) would be applied. Although no transition rule will clarify all possible cases, these proposed rules, developed in consultation with other States and transacting interests, will give guidance at least for generally expected cases.

Article 25 (withdrawal)

21. We believe the common provision of twelve (12) months for withdrawal is appropriate here as it has been in other international private law instruments.

Final provision, signature

22. This provision may need to be reformulated depending on whether approval is expected by action of the General Assembly upon recommendation of the Commission, or through a diplomatic conference.