

## Convention on E-Contracting: The Rise of International Law of Electronic Commerce?

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### Abstract

*On 23 November 2005 the United Nations General Assembly adopted a new Convention on the Use of Electronic Communications in International Contracts. The Convention on e-contracting is the most important and long awaited development in international electronic commerce law. This paper analyses the most important provisions of this convention and its potential impact on global electronic commerce.*

*The new Convention aims to enhance legal certainty and commercial predictability of international contracts where electronic forms of communication are used. Being primarily concerned with the formation of electronic contracts, it recognizes the value of electronic communications and modernizes the terminology of older conventions to embrace the impact of digital technologies. Another advantage of the Convention is its broad scope of application as it goes beyond sale of goods and covers trade in services and information. It also confirms widely recognized principles such as that of functional equivalency or irrelevancy of the geographical location of information systems.*

*However, it also has certain shortcomings. It does not deal with important areas of electronic commerce such as B2C e-commerce or online financial transactions. Furthermore, many provisions are of general nature and hence may actually introduce more legal uncertainty than predictability. In addition, the Convention is not binding yet. The knowledge of potential pros and cons of the Convention can become very useful for any businessmen engaged in global electronic commerce.*

### 1. Introduction

On 23 November 2005 the United Nations General Assembly adopted a new Convention on the Use of Electronic Communications in International Contracts (Convention on e-contracting). The Convention is the most important and long awaited development in international electronic commerce law. This is the first international convention designed specifically to recognize the growing use of electronic communication in international

contracting. This act fills a regulatory gap that has existed in this respect and gives new life to old international conventions that deal with traditional international commerce (Lando, 1985; Bianca and Bonell, 1987; De Ly, 1992).

The aim of this article is to give a brief account of the most important provisions of this Convention and to assess its potential impact on electronic trade. Not all provisions of the new Treaty will be presented as many of them are relevant to states only. The Convention on e-contracting will also be assessed from the perspective of how does it reflect the values or eValues of the Information Society thus contributing to the overall theme of the Conference. The following contribution is one of the first assessments of the new Convention not only in the information systems and business community but also in legal community.

The topic of this paper is of legal nature, so legal tools of analysis will be adopted. However, the contribution will attempt to present the regulation in simple terms so that information systems and business community can benefit from it. The analysis will be based on extensive treatment of preparatory works contained in numerous reports prepared by Working Group IV of the United Nations Commission on International Trade Law, which drafted this Convention.

The first part will present some basic facts about the Convention. The second part will present its aim, scope of application and will analyze its content. Special attention will be paid to the regulation of electronic contracts, treatment of an interactive website as an invitation to make offers and provision on error in contracting. In the third part, an attempt will be made to assess the pros and cons of the new regulatory framework for global electronic commerce.

## **2. Background Information**

The Convention was drafted by the United Nations Commission on International Trade Law Working over six sessions since 2002. It is not binding law yet. It will be open for signature by all states at the United Nations Headquarters in New York from 16 January 2006 to 16 January 2008. According to communication from the UNCITRAL Secretariat, "it is expected that a signature event would take place during the UNCITRAL's thirty-ninth session, to be held in New York from 19 June to 7 July 2006, to promote participation in the Convention by states and awareness of its provisions." (United Nations, 23 November 2005) The Convention is subject to ratification, acceptance or approval by three signatory states. Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

The Convention is short and consists of a Preamble and 25 articles. It is organized into four chapters. The first part delineates the sphere of application of the instrument. The second chapter contains general provisions including the definitions of the terms used. Chapter III, which covers the use of electronic communications in international contracts contains provisions on legal recognition of electronic communications, form requirements of a contract or a communication, time and place of electronic communications, invitation to make offers, use of automated systems for contract formation, availability of contract terms and treatment of input error. The last part contains final provisions.

The drafters of the Convention were heavily influenced by the 1980 Vienna Sale of Goods Convention (UNCITRAL, 1980) and UNCITRAL Model Laws on Electronic Commerce (UNCITRAL, 1996) and Electronic Signatures (UNCITRAL, 2001). The influence of the Vienna Convention is clearly visible in the first chapter of the Convention, and to a lesser extent in the remaining parts. On the other hand, the impact of Model laws is noticeable in the third chapter.

### **3. The Aim of the Convention**

The aim of the Convention is to remove legal obstacles to electronic commerce, including those which arose under other instruments, on the basis of the principle of functional equivalence – which is one of the most fundamental principles of electronic commerce law (UNCITRAL, 11- 22 October 2004). The Convention sets the criteria to be used for establishing functional equivalence between electronic communications and paper documents as well as between electronic and hand-written signatures. Furthermore, the Treaty aims to provide a common solution in a manner acceptable to states with different legal, social and economic systems.

The unique technique of this Convention can be found in Article 20, which has the goal of removing obstacles to e-commerce found in other international instruments adopted before the Internet era. It reads as follows:

“Art 20 (1). The provisions of this Convention apply to the use of electronic communications in connection with the formation or performance of a contract to which any of the following international conventions, to which a Contracting State to this Convention is or may become a Contracting State, apply:

Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958);

Convention on the Limitation Period in the International Sale of Goods (New York, 14 June 1974) and Protocol thereto (Vienna, 11 April 1980);

United Nations Convention on Contracts for the International Sale of Goods (Vienna, 11 April 1980); (...)”

As a result, the Convention applies to the aforementioned conventions to which a Contracting State of this Convention is or may become a party. In such case scenario, for example, the term "writing" as used in the 1980 Sale of Goods Convention would be extended to cover electronic writing. Furthermore, the provisions of the Convention also apply to other conventions than those mentioned above, but a Contracting State may declare that it is not bound by that provision. Such a declaration by Contracting State can be made, changed and withdrawn at any time.

In summary, the technique adopted in this Convention is a wise strategy as it is much easier to give new meaning to older conventions than to renegotiate all of them. In fact, without an attempt to broaden the scope of older conventions, international e-commerce would be left in legal vacuum. It is so at least with respect to written norms, as there are numerous unwritten practices that have emerged in electronic commerce that could be regarded as Internet customary law (Polanski, 6-8 June 2005; Polanski and Johnston, 7-10 January 2002; Polanski, 2002; Polanski and Johnston, 2002; Polanski, July 2003).

### **4. Scope of the Convention**

The Convention regulates 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. Nationality or character of the online entrepreneurs is irrelevant. In other words, the Convention applies to any transactions performed electronically provided that commercial parties are located in different states.

The new Convention applies to electronic contracts between parties located in two different states, even if one or both are not Contracting States. Such wording may give the Convention an excessively broad scope of application (UNCITRAL Working Group IV (Electronic Commerce), 2005) and suggests a universal character of the Treaty. The prevailing view is that the Convention should only apply when the laws of a Contracting

State applied to the underlying transaction. (UNCITRAL Working Group IV (Electronic Commerce), 2005). Therefore the Convention applies, so long as the law of a Contracting State applies to the dealings of the parties. Furthermore, any Contracting State may declare that it will apply this Convention only when the states are Contracting States or when parties have agreed that it applies.

#### **4.1 B2B Electronic Commerce**

Similarly to earlier developments in international commercial law, the new Convention is limited to Business-to-Business (B2B) electronic commerce. In consequence, its provisions do not create any rights or obligations for online entrepreneurs with respect to consumer contracts (B2C, C2C or C2B). The reason for such approach is that modern legal systems provide exclusive consumer protection, which cannot be contracted out.

The sphere of application of the Convention to B2B e-commerce is very broad. It is applicable to transactions involving the sale but it also applies to transactions other than sales such as barter. More importantly, the new Convention also covers transactions regarding services and information. In consequence, the new rules would apply to sales and other types of transactions involving goods, services or information negotiated or performed over the Internet. This is a fundamental and long awaited change. Thanks to this provision international electronic services have finally been given legal recognition.

However, not all B2B e-commerce transactions are covered as the Convention does not apply to electronic financial services and international transferable documents such as bills of exchange. It is to be regretted that this Convention excludes such important areas of electronic commerce, as these are the fields that require international regulation. Furthermore, companies may exclude the application of this Convention or derogate from or vary the effect of any of its provisions.

#### **4.2 Place of Business on the Net**

The Convention requires that all online companies must have their places of business in different states. However, the Internet is supranational and ignores political and legal borders. In addition, the phrase 'place of business' can have different meanings in Internet-based commerce. Taking into account the supranational character of the Internet, the Convention defines place of business as "any place where a party maintains a non-transitory establishment to pursue an economic activity other than the temporary provision of goods or services out of a specific location." Therefore, the Convention relies on physical address rather than a virtual one.

A party's place of business is presumed to be the location indicated by that party, unless another party demonstrates that the indication was incorrect. Place of business may also appear from any previous dealings or from information disclosed by the parties. In consequence, the Convention relies on localization data supplied by each party and expressly disregards a place where the technological equipment is located or a place where an information system can be accessed. This is a very important provision that reflects the global consensus with respect to the establishment of merchants' place of business in Internet era.

If a party has not indicated its place of business, or has more than one, then a judge or an arbitrator will select the one, which has the closest relationship to the relevant contract, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract. However, the Convention states that a domain name or electronic mail address connected to a specific country does not create a presumption that a given party has a place of business in that country.

As a result, the Convention is based on two important principles with respect to the ascertainment of parties' place of business. Firstly, it does not matter where the servers are located or what type of domain name is used. The only aspect that is relevant is an actual physical location at which a business is run and which a party should have indicated. Secondly, the Convention is primarily concerned with click-and-mortar companies that pursue both traditional and online outlets. Online players such as Amazon.com are also included because they indicate their place of business. However, the provisions of the Convention would be inapplicable to purely virtual companies that do not have any physical establishment and exist only on the Internet.

## **5. Regulation of Electronic Commerce**

The Convention regulates certain aspects of electronic commerce that are of particular importance to adjudication of legal disputes. All of these provisions can be found in Chapter III of the Convention titled: "Use of electronic communications in international contracts." The new act contains provisions that could be broadly categorized as those important in evidencing electronic communications in court proceedings (articles 8-10) and those specific to electronic contracting (articles 11-14).

### **5.1 Electronic Contracting**

The Convention on e-contracting provides answers to important questions that arise in the context of electronic contracting such as whether web-based contracts are valid, whether a website should be regarded as a binding offer or not and what are the consequences of input error. These rules are novel in a sense that earlier international instruments did not address these issues. Since these norms might also be important for Internet merchants they will be discussed at a greater level of detail below.

### **5.2 Validity of Electronic Contracting**

The Treaty confirms a well established principle on international commercial law that a contract or a communication can be made or evidenced in any particular form. In consequence, electronic contracts concluded via websites, exchange of emails or EDI messages are treated like paper-based contracts:

"... a contract shall not be denied validity or enforceability on the sole ground that it is in the form of an electronic communication."

In addition, the Treaty expressly recognizes a contract formed by a computer system and a natural person, or by the interaction of automated message systems. Such contract shall not be denied validity or enforceability on the sole ground that no natural person reviewed or intervened in each of the individual actions carried out by the automated message systems or the resulting contract. In consequence, automated transactions of Internet merchants are treated as paper-based deals of traditional entrepreneurs.

### **5.3 The Problem of Electronic Offer**

One of the most controversial and unpredictable issues in electronic commerce is the treatment of a website as a binding offer or non-binding invitation to treat. The proper classification might have enormous consequences for online merchant who can be found bound by his statements on a website. Obviously the problem is related also to other forms of electronic communications such as EDI, but it is most clearly visible in web-based commerce. Therefore, only the latter will be used in the analysis below.

Article 11 contains the following presumption with regards to the status of interactive ordering systems. “A proposal to conclude a contract made through one or more electronic communications which is not addressed to one or more specific parties, but is generally accessible to parties making use of information systems, including proposals that make use of interactive applications for the placement of orders through such information systems, is to be considered as an invitation to make offers, unless it clearly indicates the intention of the party making the proposal to be bound in case of acceptance.”

The reading of the article suggests that as a rule of thumb web-based sellers should be treated as presenting non-binding statements of intentions to enter into contractual arrangements. There are two conditions, however. Firstly, they should not address electronic communications to one or more specific persons. Secondly, they should not clearly indicate the intention to be bound in case of acceptance.

With respect to the first requirement, it is clearly fulfilled by vast majority of websites. All static websites fall into this category and majority of dynamic ones. However, some dynamic websites could fulfill this requirement. It is argued that the drafters failed to notice that after a customer logs into such an interactive ordering system, the proposal is always specifically addressed to him or her, which can be easily ascertained if a system has implemented shopping cart technology. In consequence, from that moment in time, such proposals should be treated as offers provided that they are very specific, addressed to a registered user and allow for immediate placement of an order.

Clearly, the provision of Article 11 is not a very fortunate one. It fails to take into account the fact that registration in any online system can be regarded as a communication addressed to a specific person. Furthermore, it does not even define what constitutes an invitation to treat and how it is to be distinguished from an offer. Finally, it uses the confusing term "interactive applications for the placement of orders" rather than "automated message system" used elsewhere in the text, which might lead to future unnecessary problems of interpretation.

#### **5.4 Electronic Mistake**

One of the most cumbersome issues discussed in the legal literature with respect to electronic contracting is treatment of mistake. Since the electronic communication takes place often between pre-programmed devices, very rapidly and at a distance, mistakes might be difficult to notice and correct. The Treaty regulates consequences of a contractual mistake in the following manner:

“Article 14. Where a person makes an input error on an interactive website and is not given the opportunity to correct it, he or she has the right to withdraw the portion of the electronic communication if he or she:

- (a) (...) notifies the other party of the error as soon as possible; and
- (b) (...) has not used or received any material benefit or value from the goods or services, if any, received from the other party.”

Firstly, the treatment of electronic mistake is *expressis verbis* limited to transactions concluded via interactive websites and not through passive websites, email, chat or EDI. Secondly, a person who made an input error has the right to withdraw from it. Thirdly, to exercise the right of withdrawal, he or she must promptly notify the other party. Fourthly, the condition for the exercise of the right of withdrawal is that he or she has not benefited from the transaction by e.g. downloading a piece of software from a website and then trying to return it. Fifthly, no time limit was set for the exercise of the right of withdrawal, thereby introducing legal uncertainty.

The regulation of input error spurred a great deal of controversy. Critics argued that such a provision might conflict with well-established contract law principles, is more appropriate for consumer transactions and that it would create serious difficulties for trial courts, since the only evidence of the error would be the assertion of the interested party that he or she made an error. The proponents argued that the type of error is specific to electronic communication and therefore deserves special treatment, that it provides a much needed uniform rule in view of the differing and possibly conflicting national rules and that it did not in any way aggravate the evidentiary difficulties that already exist in a paper-based environment, because the courts would have to assess all the circumstances anyway. The proponents won, but the purpose of this provision is not entirely clear.

In summary, the Convention regulates the question of who should bear the risk of input error in electronic communication. However, it only provides for consequences of input error. It does not oblige online entrepreneurs to introduce methods of error identification and correction, despite the fact that numerous common practices have emerged in this regard (Polanski, 6-8 June 2005). The drafters felt that such a prescriptive provision would be incompatible with "the enabling nature" of the Convention. In consequence, online entrepreneurs should rely on well-established common practices in this area that serve the purpose of identifying and correcting input errors.

## **5.5 Evidence of Electronic Transactions**

The Convention also includes a number of provisions that are well known from the earlier non-binding laws on electronic commerce and electronic signatures. These provisions relate both to electronic communication and electronic contracting, but only the latter one will be discussed below.

## **5.6 Requirements for Writing, Signature and Originality**

Treaty on e-contracting specifies the requirements for electronic writing, signature and originality expressed in the 1996 Model Law on Electronic Commerce. The requirement of writing is met by an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference. In consequence, if terms of an electronic contract are capable of being reproduced they would be considered as being written down.

On the other hand, the requirement of signature is met if a method is used that identifies the party, indicates its intention and is as reliable as appropriate to its purpose (or proven in fact to have fulfilled the above functions). The provision is very general and certainly embraces electronic signatures. Other technologies might turn out to be risky to rely on in court proceedings.

Probably the most challenging issue is the question of which electronic document is original, as legal systems very often require a document to be presented in such form. The requirement of originality is met if the integrity of information is reliably assured from the time when it was first generated in its final form and the information can be displayed to the person requesting it. The integrity of information is assured if it has remained complete and unaltered, apart from any changes that arise in the normal course of electronic data transfer. The standard of reliability shall be assessed in the light of the purpose for which the information was generated and all relevant circumstances.

In summary, all of these important concepts are described in very general terms. Particularly requirements for signature and original might become difficult to apply in practice.

## **5.7 Time and Place of Contract**

The Convention contains provisions on time and place of dispatch and receipt of electronic messages. As a rule of thumb, the place of business designates the place where the information was dispatched or received, even if supporting information system is located elsewhere. On the other hand, the time of dispatch is the time when a message leaves the computer system of a sender, whereas the time of receipt is the time when it becomes capable of being retrieved by the addressee at a designated electronic address.

On the other hand, the message is presumed to be capable of being retrieved when it reaches the addressee's electronic address. The correct electronic address is important, because the time of receipt at another address is when the addressee becomes aware that a message has been sent and that it can be retrieved. The aforementioned provision is well suited to email and EDI-based electronic commerce, but it may not be so easy to establish in case of web-based commerce, because such information would usually be recorded only by one information system.

## **6. Interpretation of the Convention**

Reading any legal document is not easy, particularly international treaties. Consequently, it is important to know how to interpret such acts. The Convention provides guidance in this respect. According to Article 5, the provisions of the Convention should be interpreted having regard to its international character and the need to promote uniformity and the observance of good faith in international trade. On the other hand, gaps are to be settled in conformity with the general principles on which it is based such as the principles of functional equivalence and technological neutrality, expressly referred to in the Preamble. Only in the absence of such principles, questions not expressly settled in the Convention should be answered by the applicable law of a given state.

This regulation of interpretation of the Convention reflects the autonomous character of the Convention. It should be interpreted according to the principles on which it is based and not some national rules. Only when the application of such principles turns out to be impossible to apply, the Convention resorts to a law of a given national state.

However, the autonomous character of the Convention is adversely affected by lack of explicit reference to the principles and values of Internet community. Furthermore, the new Treaty does not contain the recognition of binding character of trade usages akin to the formulation found in Article 9 of the Vienna Sale of Goods Convention (Bianca and Bonell, 1987). It is impossible to understand why UNCITRAL experts did not recognize the importance of commercial usages in electronic commerce. Such an approach is deeply flawed as it ignores probably the most powerful source of norms in global electronic commerce.

## **7. Assessment of the Convention**

The new Convention is certainly the most important international development in the field of Internet law, which can bring more predictability to global electronic trade. The most important advantage of the new Convention is that it modernizes the terminology of older conventions to embrace the impact of digital technologies. Being primarily concerned with the formation of electronic contracts, it recognizes the legal value of electronic communications and online contracts, which are given the same weight as paper-based ones.

Another advantage of the Convention is its broad scope of application as it goes beyond sale of goods and covers electronic trade in services and information. None of the earlier

acts had such a broad sphere of application. The new Convention also confirms widely recognized principles such as that of functional equivalency or irrelevancy of the location of information systems, which could be regarded as eValues of the Internet community.

The Treaty increases the certainty of electronic contracting by expressly recognizing Internet transactions. One might argue that it attaches special importance to automated message systems such as online marketplaces, interactive electronic shops or EDI. The Convention also removes the barrier to electronic commerce by specifying the requirements for the recognition of electronic writing, signature and original.

Commercial predictability of electronic transactions is increased by the regulation of input error. Furthermore, the Convention enhances legal certainty of online contracts by creating a presumption as to the non-binding character of web-based catalogues. Finally it offers a useful definition of parties' place of business, specifies time and place of electronic communication

However, the new Treaty also has some shortcomings. The conventional norms are vague and can be difficult to read for an average online merchant. It is not a very innovative instrument as it repeats many of the provisions found in earlier documents. Furthermore, having broader scope than traditional commercial conventions it nevertheless excludes fundamental areas of e-commerce where uniform, international regulation is really necessary.

Flexibility of e-contracting is seriously undermined by lack of recognition of electronic trade usages that have emerged in electronic commerce, such as order confirmation or encryption of transactions. In fact, the drafters have expressed their resentment towards customs of Internet community. Such an approach ignores the most promising source of norms and does not seem to take into account the values of Internet community enshrined in its practices.

Finally, United Nations failed to realize the value of public consultations with the Internet community. Only states and interested international organizations were invited to participate in the preparation of the draft Convention at all the sessions of the Working Group IV with a full opportunity to speak and make proposals. The fact that the Internet users could not participate in the drafting process and express its opinions on UNCITRAL's website is against the spirit and the fundamental value of the Internet community, which continues to be developed through open sharing of information. Global Internet regulations should at least be consulted with the users.

Despite its shortcomings, the UN Convention on the Use of Electronic Communications in Electronic Contracts represents a major step forward in the international regulation of electronic commerce. Many of the critical comments expressed above might be addressed in the Explanatory Report, which was not yet available at the time of this writing. Therefore, it is advisable for all states to ratify this Convention in order to bring more certainty and predictability to modern international trade.

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