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**CURRENT WORK BY UNCITRAL IN THE FIELD OF ELECTRONIC COMMERCE**

Submitted by the UN/CEFACT Legal Rapporteur

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This document has been drafted by the Legal Rapporteur for information.

## Introduction

As the core legal body in the United Nations system in the field of international trade law, the United Nations Commission on International Trade Law (UNCITRAL) has been active in the field of electronic commerce legislation for over 15 years. Instruments such as the UNCITRAL Model Law on Electronic Commerce (1996) and the UNCITRAL Model Law on Electronic Signatures (2001) were prepared in cooperation with the United Nations Economic Commission for Europe (UNECE) and (in the case of the former instrument) at the initiative of the Working Party on Facilitation of International Trade Procedures (WP.4) of the Committee on the Development of Trade, the body out of which UN/CEFACT was created.

While UNCITRAL's work on electronic commerce has focused, to date, on developing a set of legal principles that would provide a basic legal framework for communication through electronic means, the growth in the use of electronic commerce has seen the emergence of a number of other legal issues which are increasingly identified as requiring consideration and resolution. Issues currently under consideration include: legal obstacles to the increased use of electronic commerce that might stem from existing international conventions; electronic contracting; electronic transfer of rights in tangible goods and other rights; and dispute resolution.

### A. Legal obstacles to electronic commerce in existing international conventions

At its thirty-second session (June 1999), the attention of the Commission was drawn to a draft recommendation adopted on 15 March 1999 by UN/CEFACT. That text recommended "that UNCITRAL consider the actions necessary to ensure that references to 'writing', 'signature' and 'document' in conventions and agreements relating to international trade allow for electronic equivalents". After some preliminary studies by the Secretariat, the Commission, at its thirty-fourth session, in 2001, decided that the UNCITRAL Working Group on Electronic Commerce should, *inter alia*, undertake work towards the preparation of an appropriate international instrument or instruments to remove possible legal barriers to the use of electronic commerce which might result from international trade law instruments.

For that purpose, the Commission requested the secretariat to carry out a comprehensive survey of possible legal barriers to the development of electronic commerce in international instruments. Such a study should aim at identifying the nature and context of such possible barriers with a view to enabling the Working Group to formulate specific recommendations for an appropriate course of action (A/56/17, paras. 291-295).

The work that has been thus far undertaken by the Secretariat pursuant to that request is reflected in a Note by the Secretariat that was prepared for consideration at the 39<sup>th</sup> session of the Working Group on Electronic Commerce, in March 2002 (A/CN.9/WG.IV/WP.94). The survey has been limited, as a starting point, to multilateral treaties registered with the Secretary-General of the United Nations. Pursuant to a request by the Working Group, the secretariat is currently seeking the views of other international organizations, including organizations of the United Nations systems and other intergovernmental organizations, as to whether there are international trade instruments in respect of which those organizations or their member States acted as depositaries that those organizations would wish to be

included in the survey being conducted by the secretariat.

## **B. Electronic contracting**

The UNCITRAL Model Law on Electronic Commerce addresses some basic issues relating to electronic contracting: article 11 addresses the formation and validity of contracts and the form in which an offer and acceptance may be expressed; article 13, attribution of data messages; article 14, the use of acknowledgements of receipt, a system widely used in electronic commerce; and article 15, the time and place of dispatch and receipt of data messages. Article 5bis addresses incorporation by reference, often regarded as essential to the widespread use of electronic communications, which much more frequently than paper documents rely on references to information accessible elsewhere. The purpose of these articles is not to deal comprehensively with electronic contracting issues, but to provide a basic enabling framework and a series of provisions which could form the basis of interchange agreements or system rules, or supplement the terms of agreements in cases of gaps or omissions in contractual stipulations.

What the Model Law does not address are aspects of contract formation and performance that may be affected by the ways in which electronic transactions are currently structured and by the ways in which those structures are being changed to facilitate electronic commerce, as well as the impact of electronic commerce on the subject matter of contracts. Where contracts are formed, for example, between a person and an electronic agent, the limited scope for statements by the person to alter or vitiate agreement to which the electronic agent cannot react suggests a need for review and possible modification of rules on offer and acceptance. In respect of the transactional subject matter of Internet contracts, the laws governing sales of goods may not be appropriate for contracts involving on-line databases, artificial intelligence systems, software, multimedia, and Internet trade in information, where the emphasis is not upon tangible goods, but upon intangibles and rights in those intangibles.

The Working Group on Electronic Commerce started its deliberations on a possible international instrument dealing with issues of electronic contracting at its 39<sup>th</sup> session, in March 2002. An initial draft of such an instrument, tentatively in the form of an international convention, is contained in annex I to document A/CN.9/WG.IV/WP.95.

## **C. Electronic transfer of rights in tangible goods**

Transfers of rights by computer while goods are in transit, warehoused or otherwise available currently occurs largely within closed or limited access network systems and within narrowly defined sectors. If such transfers were supported by an appropriate international framework for electronic bills of lading, title documents or security interest transfers, trade in goods across a wide area could be facilitated more efficiently and at lower cost. Such a framework could build upon recent international experience and existing UNCITRAL work. The UNCITRAL secretariat is monitoring developments in this area. The last written progress report (A/CN.9/WG.IV/WP.90) was considered by Working Group at its 38<sup>th</sup> session, in 2001.

## **D. Dispute resolution**

Some of the issues outlined above will lead inevitably to growth in international disputes, which may require new and innovative solutions. Whether electronic commerce disputes are referred to conventional arbitration forums, located in existing physical jurisdictions, or resolved online in a “cyberspace jurisdiction”, a number of procedural and substantive issues will need to be considered.

One issue on which considerable attention has been focused, both in UNCITRAL and elsewhere, and which relates generally to electronic commerce, is that of the arbitration agreement and provisions in national laws and international conventions that require the arbitration agreement to be “in writing” in order to be valid. Applicable law is also an issue, while online dispute resolution may raise questions of place of arbitration; conduct, language, confidentiality and security of the proceedings; admissibility of evidence; the making of an award; and the jurisdiction of courts providing legal support to the arbitration, as well as possible review and enforcement of the award, especially in the face of some of the jurisdictional issues mentioned above.

Over the last few years, a number of projects have been established to offer online dispute resolution services. Some are designed to deal with a limited subject matter specifically related to the Internet, such as domain name disputes, while others focus upon online resolution as the means of handling the dispute, regardless of subject matter. The first international body to enter into this field was the World Intellectual Property Organization (WIPO) Arbitration and Mediation Center, which was established to provide an internet-based, on-line dispute resolution system that can provide a neutral, speedy and inexpensive means of resolving disputes without the need for physical movement of persons and things. The system has been developed with the principal aim of resolving disputes concerning domain names and trademarks and, more generally, for all intellectual property disputes. The first administrative panel decision was given in a domain name dispute in January 2000. Another international organization proposing work in this area is the International Chamber of Commerce, which is proposing to pool experts from a variety of disciplines in order to encourage the creation of simple, accessible and equitable dispute resolution options for consumer transactions over the Internet.

With a view to proposing a course of action for the United Nations in the field of on-line dispute resolution, UNCITRAL is monitoring on-line dispute resolution systems currently being experimented with.

UNCITRAL is also studying the need, if any, for adaptations to existing uniform legislative texts. Based on its unique experience in the field of dispute resolution, as evidenced by the various international instruments developed by UNCITRAL or administered under its auspices (the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), the UNCITRAL Arbitration Rules, the UNCITRAL Conciliation Rules, the UNCITRAL Model Law on International Commercial Arbitration, the UNCITRAL Notes on Organizing Arbitral Proceedings), UNCITRAL is finalizing the draft UNCITRAL Model Law on International Commercial Conciliation (expected to be adopted in June 2002). A review of the UNCITRAL Model Law on International Commercial Arbitration and of the New York Convention with a view to promoting the use of those instruments in electronic commerce is also under way.

The report of the UNCITRAL Working Group on Arbitration on the work of its thirty-sixth session (March 2002) devoted to those topics is contained in document A/CN.9/508.

All UNCITRAL documents are available in the six working languages of the United Nations on its website <http://www.uncitral.org>

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