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ELECTRONIC COMMERCE AGREEMENT

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Recommendation No. 31

ELECTRONIC COMMERCE AGREEMENT

I. Introduction

Electronic commerce offers new opportunities to improve the efficiency of business operations and to reduce costs associated with trade procedures, providing increased competitive advantages to the commercial actors ready to embrace new methods of work and trade.

Emerging electronic commerce platforms and the use of the Internet provides users with a combination of technologies to communicate data, to contract electronically as well as to manage new business processes leading to new business models.

The legal framework, which traditionally relies on paper-based business procedures and requirements such as hand-written signatures, is in the process of being adapted to these new technologies. At the global level, the availability of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on electronic commerce adopted in 1996 provides a framework to adapt legislation. International organisations such as the World Trade Organization (WTO), UNCITRAL, the Organization for Economic Co-operation and Development (OECD), the United Nations Conference on Trade and Development (UNCTAD), and the International Chamber of Commerce (ICC) are actively involved in discussions with governments and businesses to address a number of key legal issues raised by the emergence of a global marketplace for electronic commerce. At regional or local level, new laws are being proposed or enacted to address a number of these issues.

Though the emerging legal framework of the global marketplace for electronic commerce, once completed, will contribute to the building of trust required for its further development, the use of electronic commerce still raises a number of issues which can be better addressed through a contractual process.

II. Objectives

With the objective of contributing to the building of trust between business entities and taking advantage of the experience gained with the EDI Interchange Agreement (UN/ECE Recommendation No. 26), UN/CEFACT adopted the following Recommendation at its sixth session in March 2000. The list of countries and organizations present at the session can be found in the Annex .

UN/CEFACT is proposing with this Recommendation a model for a contractual approach of electronic commerce operations. This approach takes into consideration the need for a framework of basic provisions to be agreed by business entities combined with the flexibility required to conduct day-to-day commercial transactions.

The Electronic Commerce Agreement, hereinafter referred to as the "**E-Agreement**", is intended to serve the commercial requirements of business to business electronic commerce partners. It contains a basic set of provisions which can ensure that one or more electronic commercial transactions, hereinafter referred to as "**E-Transactions**", may subsequently be concluded by commercial partners within a sound legal framework.

The E-Agreement aims at addressing all forms of electronic communications available to conclude E-Transactions. Commercial partners engaged into contractual relations based exclusively on EDI are recommended to continue to use the EDI Interchange Agreement. Commercial partners engaged in contractual relations based on the use of a combination of electronic commerce technologies including EDI are recommended to use the E-Agreement and, to the extent necessary, replace the use of an EDI Interchange Agreement by the E-Agreement.

Limitations

Though the E-Agreement could be used in relationships between businesses and consumers, it does not incorporate any provisions relating to consumer protection. Consumer protection law is generally mandatory and in most cases the consumer's national and local consumer protection law will be applicable when a consumer concludes a transaction. Businesses wishing to use the E-Agreement for entering into contractual relationships with consumers must therefore recognize the need for compliance with national and local consumer protection laws.

Furthermore, appropriate revisions will be required if the E-Agreement is to be used with administrative or official agencies.

Actions to be undertaken by the Parties

The E-Agreement provides the framework for the conclusion of subsequent E-Transactions. In several instances, the E-Agreement provides the Parties with choices between alternatives. The Parties are advised to review carefully the choices available and to decide whether to adopt the default or one of the other options. Furthermore, the Parties are advised to take the following steps in connection with finalizing the E-Agreement:

- determine which forms of communication and which Messages shall be used and to specify these in Section 2,
- determine which terms and conditions shall apply to the E-Transactions to be undertaken and to specify these in Chapter 2.

The Parties should also be aware that there may be national or local limitations which apply to specific provisions or lead to restrictions which may generally need to be taken into consideration. Each Party must therefore, in addition to entering into the E-Agreement, take appropriate steps to ensure compliance with its own national and local laws, in particular with regard to :

- storage of messages
- V.A.T. and other tax regulations
- data protection, including the rules in the European Community Directive No. 95/46/EEC on data protection if one of the Parties is a resident of the European Union.

The Parties should also ensure that the level of security which they utilize will be appropriate for the E-Transactions. For instance, the Parties may consider using public key cryptography or other measures to improve the safeguards against errors in communication and interception of messages and to enhance the evidential value of records of the Parties' electronic communications.

Many jurisdictions require a strict proof that terms incorporated by reference have been agreed by both parties. In order to minimize the evidential problems, the parties are advised to agree to a method of referring to the E-Agreement when concluding E-Transactions and to include such reference in all communications which shall be subject to the terms of the E-Agreement. This may be done by including a specific code or referring to the words "E-Agreement" in section 2.1 and by using such code or reference in subsequent communications.

Commercial partners should also be reminded that in many cases electronic commerce involves international transactions and that the legal complexities cannot be addressed in a standard agreement. Complementary advice might therefore prove necessary.

How to use the E-Agreement

The E-Agreement can be used either for one transaction or for multiple transactions. The E-Agreement shall be entered into before the E-Transaction, including in the case where it shall be used for only one transaction.

The E-Agreement shall then determine the basic rules applicable to the transaction and, if Chapter 2 is included in the E-Agreement, its performance. When the E-Agreement has been entered into, the subsequent communications regarding the commercial transaction(s) shall refer to the E-Agreement and thereby incorporate the framework established by the E-Agreement.

The Acceptor may select one or more of the methods of communication offered by the Proposer. If the Acceptor selects fewer methods of communication than proposed by the Proposer then both the Proposer and the Acceptor shall only use those methods of communication which were selected by the Acceptor.

The **E-Agreement** consists of two parts:

A. the **Instrument of Offer**, whereby a Party offers to enter into commercial contractual relationships by electronic means and sends to the other Party, or makes available to the other Party, the terms under which it is prepared to do this. This instrument can also be used by someone who does not find the initial terms proposed acceptable and sends a new Instrument of Offer to the initial sender, incorporating the proposed changes.

B. the **Instrument of Acceptance** is submitted by the Acceptor of the terms proposed in the Instrument of Offer if the terms proposed in the Instrument of Offer are acceptable.

The Parties may alternatively enter into negotiations on the content of the E-Agreement before forwarding an Instrument of Offer in a form acceptable to both Parties which records the terms agreed.

The E-Agreement is concluded by the exchange/combination of the Instruments of Offer and Acceptance and does not require further formality. Signature is not mandatory since the terms of the agreement between the Parties are clear from the exchange of the two Instruments.

Some caution need, however, to be exercised as regards the recording of the Instruments. Both Instruments should be recorded and stored by each Party. Evidence and arbitration clauses may in some countries require a written and signed document. Care must therefore be exercised concerning these provisions.

The Party forwarding the Instrument of Offer is hereinafter referred to as the "Proposer" and the Party forwarding the Instrument of Acceptance is referred to as the "Acceptor". The Proposer and the Acceptor are collectively referred to as the "Parties".

When the Parties have entered into the E-Agreement, they may subsequently enter into E-Transactions in the way set out in the E-Agreement, i.e. normally by the forwarding or display of an offer by the sender (who may be either the Proposer or the Acceptor) and the forwarding of an acceptance from the other Party.

In the electronic version of this Agreement the instrument of Acceptance will include only the means of communication chosen by the Proposer.

The E-Agreement contains a number of provisions in which the Parties shall choose between two or more alternatives. These choices are marked with square brackets [] and the alternatives are marked with a slash / . If the Parties have not chosen between the alternatives, the **underlined** text shall apply as a default, while the text not underlined shall be disregarded.

A. INSTRUMENT OF OFFER

Hereby, the Proposer offers to the Acceptor to enter into an agreement as specified below. Any subsequent communication between the Parties which the Parties intend to make subject to this Agreement shall refer to this Agreement by including [the words "E-Agreement" / specify other identification code or other means of referring to the Agreement].

It is a term of this offer that its acceptance and the creation of an E-Agreement shall not be taken as implying any obligation on either Party to enter into any further contractual relationship.

The Instrument of Offer must be accepted by the Acceptor sending an Instrument of Acceptance duly filled out and received (as defined in Section 2.3.1) by the Proposer no later than [24 hours after the Acceptor's receipt of this Instrument of Offer / specify other time for receipt]. If the Instrument of Offer is accepted within this time period, the following shall constitute the agreement between the Parties.

CHAPTER 1 – THE E-AGREEMENT

1. Identification of the Proposer

Any contract entered into by an exchange of messages forwarded by the electronic means specified in Section 2.1 below between the Proposer and the Acceptor shall be made with the following legal entity:

[Insert the Proposer's complete and accurate:

- Company name
- Corporate Address
- Identification number/Trade Registrar number/Professional registration number (if applicable)
- VAT or other tax number
- Telephone, fax numbers and electronic mail address or website address.

2. Communication

2.1 Method of Communication

[EXPLANATORY REMARK: IT IS STRONGLY RECOMMENDED THAT THE PARTIES SPECIFY THE METHOD OF COMMUNICATION]

The Proposer proposes that the parties shall communicate by the following methods of communication:

[Any electronic method of communication / specifically agreed communications:]

Sample of types of messages	Method of communication			
	Website	EDI	e-mail	Other [specify]
Invitation to offer/treat				
Offer				
Acceptance				
Revocation				
Acknowledgement				
Notice				
[add others as appropriate]				

In the Instrument of Acceptance, the Acceptor shall state which methods of communication the Acceptor can accept. Any communication by the means accepted by both the Proposer and the Acceptor shall hereinafter be referred to as a "Message".

2.2. Communication Standards, software and Third Party Provider(s)

The Proposer proposes that the Parties use the following communication standards, software and third party provider (where required to be used):

- Names of communication standards
- Software products/version numbers
- Third party provider(s)

Each Party shall notify the other Party before making any changes in systems operations, hardware or software which may affect communications between the Parties or which may change the information set out in these sections 2.1 and 2.2. In connection with such notification, the notifying Party shall ask the other Party to inform the notifying Party whether the change is acceptable. The change shall only take effect when the other Party has accepted such change.

2.3. Receipt and Acknowledgement of Receipt

2.3.1 Definition of Receipt

Receipt occurs at the time when a Message [is made available to the receiving Party at the electronic address used by the receiving Party / other definition of receipt].

2.3.2 Acknowledgement of Receipt

The receiving Party [shall / shall not] be obliged to acknowledge receipt of a Message [unless the sender requests an acknowledgement].

An acknowledgement may be given by [specify type of Message / any communication by the receiving

Party, automated or otherwise, or any conduct of the receiving Party sufficient to indicate to the sender that the Message has been received].

Where the sender has indicated or the law prescribes that a Message is conditional on receipt of an acknowledgement, the Message is treated as though it has never been sent, until the acknowledgement is received.

In the case where the receiving Party is obliged to provide an acknowledgement of receipt and the sender has not indicated that the Message is conditional on receipt of the acknowledgement, and where the acknowledgement has not been received by the sender within [specify time for acknowledgement / a reasonable time], the sender:

(a) may give notice to the receiver stating that no acknowledgement has been received and specifying a reasonable time by which the acknowledgement must be received; and

(b) if the acknowledgement is not received within the time specified in (a) above may, upon notice to the addressee, treat the Message as though it had never been sent, or exercise any other rights the sender may have.

Where the sender receives the receiving Party's acknowledgement of receipt, it is presumed that the Message was received by the receiving Party. That presumption does not imply that the Message corresponds to the Message received. If the acknowledgement makes a statement regarding the Message received, such statement is presumed to be correct.

2.4 Errors in Communication

A Party [must / need not] give notice to the other Party of circumstances, including technical errors in a received transmission, which prevent the further

processing of a Message. Such notice shall be given [as soon as reasonably possible / specify time period].

The receiver is entitled to regard each Message received as a separate Message and to act on that assumption, except to the extent that it duplicates another Message and the receiver knew or should have known, had it exercised reasonable care or used any agreed procedure, that the Message was a duplicate.

The receiver is entitled to regard the Message as received as being what the sender intended to send, and to act on that assumption. The receiver is not so entitled when it knew or should have known, had it exercised reasonable care or used any agreed procedure, that the transmission resulted in an error or delay.

3. Validity and conclusion of E-Transactions

3.1 Validity

**[EXPLANATORY REMARK:
MANY JURISDICTIONS REQUIRE THIS
PROVISION TO BE IN WRITING AND/OR SIGNED]**

The Parties agree that valid and enforceable obligations may be created by the communication of Messages. The Parties expressly waive any rights to object to the validity and/or admissibility of the E-Agreement and any E-Transactions solely on the ground that communication between the Parties occurred through the use of electronic communication.

3.2 Conclusion of an E-Transaction

An E-Transaction shall be formed when the Message sent as acceptance of an offer has been accepted as specified in Section 3.2.4.

3.2.1 Definition of an Offer

A Message constitutes an offer if it includes a proposal for concluding a contract addressed to one or more specific persons which is sufficiently definite and indicates the intention of the sender of the offer to be bound in case of acceptance.

A Message made available electronically at large shall, unless otherwise stated therein, not constitute an offer.

3.2.2 Revocation

Any offer shall, unless otherwise agreed or expressly stated in the offer [be / not be] revocable. If revocable, an offer may only be revoked if notice of

such revocation is [received by / sent to] the receiver of the offer before acceptance has been [received by / sent to] the sender.

Any acceptance may [be / not be] withdrawn. If withdrawable, such a withdrawal shall only be effective if notice of the withdrawal is received before the acceptance to be withdrawn has been received.

3.2.3 Acceptance Period

An offer shall lapse [24 hours / specify other time period] following the receipt of such offer, unless otherwise stated in the offer or the offer has been accepted during this time period. If the acceptance is received later, the receiver may treat the acceptance as a new offer.

3.2.4 Acceptance

An offer (as defined in Section 3.2.1 above) shall be accepted when the sender of such offer has received an unconditional acceptance of the offer within the time limit specified.

4. Other Provisions

4.1 Choice of Law

This E-Agreement shall be governed by the national laws of [insert country / the place of establishment of the Proposer / the law applicable in accordance with the applicable rules of private international law] excluding its conflict of laws provisions.

The E-Transactions shall be governed by the national laws of [insert country / the place of establishment of the Proposer excluding its conflict of laws provisions / the country whose laws apply under the rules of private international law or the law chosen in each E-Transaction].

4.2 Severability

Should any provision of this E-Agreement be for any reason invalid or unenforceable, all other provisions of the E-Agreement shall remain in full force and effect.

4.3 Termination

Any Party may terminate this E-Agreement upon not less than [30 days / other time period] prior notice of the termination. No termination shall affect any communications occurring prior to the termination, or the performance of any related transactions. Those provisions which by their nature are continuing obligations shall survive any termination and remain binding upon the Parties.

4.4 Entire Agreement

This E-Agreement constitutes the complete agreement of the Parties on the subject matters of this E-Agreement.

4.5 Choice of Forum

[EXPLANATORY REMARKS: MANY JURISDICTIONS REQUIRE THIS PROVISION TO BE IN WRITING AND/OR SIGNED. THE PARTIES MAY CHOOSE TO INSERT APPROPRIATE LOCAL ALTERNATIVE DISPUTE RESOLUTION]

[Alternative 1: Jurisdiction clause: Any dispute arising out of or in connection with this E-Agreement shall be referred to the courts of the place specified in 4.1 above / insert country and municipality or district]. However, a Party shall furthermore have the right to sue the other Party in the courts at the other Party's domicile.

[Alternative 2: Arbitration clause: Any dispute arising out of or in connection with this E-Agreement, including any question regarding the existence, validity or termination hereof, shall be referred to and finally resolved by the arbitration of one/or three person(s) to be agreed by the Parties, or failing agreement, to be nominated by in accordance with and subject to the rules of procedure of]

Any dispute arising out of or in connection with any E-Transaction shall be referred to the courts competent under the relevant rules of private international law / the court or arbitration stated in the above / the courts of: insert country and municipality.]

The Parties shall use their best endeavours during a period of thirty days after a dispute arises to resolve any such dispute.

CHAPTER 2 - THE E-TRANSACTION(S)

The E-Transaction(s) shall be subject to the following terms and conditions:

[If desired, include specific provisions on the terms applicable for the E-Transaction(s), including terms of delivery, payment type and terms, title and ownership, passing of risk, rights etc., according to the type of E-Transactions to be undertaken / Include reference to the terms applicable].

The terms applicable to the E-Transactions shall be construed in accordance with this Agreement. In case of conflicts, the terms of Chapter 1 of this

Agreement] / the terms of Chapter 2 of this Agreement, including the general terms referred to shall have preference.

B. INSTRUMENT OF ACCEPTANCE

E-Agreement [insert other identification code as specified in the Instrument of Offer.]

Hereby the Acceptor accepts the Instrument of Offer dated [insert date], from [insert name of the Proposer].

1. Identification of the Acceptor

Subsequent E-Transactions between the Proposer and the Acceptor shall be made with the following legal entity :

[Insert the Acceptor's complete and accurate:

- Company name
- Corporate Address
- Identification number/Trade Registrar number/Professional registration number (if applicable)
- VAT or other tax number
- Telephone, fax numbers and electronic mail address or website address].

2. Communications

2.1 Form of communication

[EXPLANATORY REMARK / IT IS STRONGLY RECOMMENDED THAT THE PARTIES SPECIFY THE FORM OF COMMUNICATION]

The Acceptor agrees to communicate by the following method(s) of communication (being all or some of the methods as specified in 2.1 of the Instrument of Offer):

Any electronic form of communication/specifically agreed communications:

ANNEX

COUNTRIES AND ORGANIZATIONS IN ATTENDANCE

Countries and organizations in attendance at the UN/CEFACT session where this recommendation was approved.

Participants in the sixth UN/CEFACT session in March 2000 included representatives of the following countries: Albania, Australia, Austria, Azerbaijan, Belarus, Belgium, Brazil, Bulgaria, Canada, Chile, Croatia, Cuba, Czech Republic, Denmark, Egypt, Finland, France, Germany, Guatemala, Hungary, Iceland, India, Iran (Islamic Republic of), Ireland, Israel, Italy, Japan, Kenya, Kyrgyzstan, Lithuania, Luxembourg, Malaysia, Mongolia, Nepal, Netherlands, Philippines, Poland, Republic of Korea, Romania, Russian Federation, Senegal, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Syrian Arab Republic, The former Yugoslav Republic of Macedonia, Turkey, Ukraine, United Kingdom, United States. The European Union (EU) was also represented.

The following intergovernmental organizations participated: the Bank for International Settlements (BIS), the Danube Commission (CD), the European Free Trade Association (EFTA), the League of Arab States, the Universal Postal Union (UPU), the World Customs Organization (WCO), and the World Trade Organization (WTO).

The following United Nations bodies were also represented: the United Nations Office for Drug Control and Crime Prevention (UN/ODCCP), the United Nations Commission on International Trade Law (UNCITRAL), the United Nations Conference on Trade and Development (UNCTAD), and the World Bank.

The following non-governmental organizations participated: the United Towns Agency for North-South Cooperation, the International Railway Transport Committee (CIT), the International Article Numbering Association (EAN), the European Electronic Messaging Association (EEMA), the International Association of Ports and Harbours (IAPH), the International Chamber of Commerce (ICC), the International Electrotechnical Commission (IEC), the International Multimodal Transport Association (IMTA), the International Organization for Standardization (ISO), and the Society for Worldwide Interbank Financial Telecommunications (S.W.I.F.T).

Observers present at the invitation of the secretariat included representatives of the Electronic Commerce Code Management Association (ECCMA), the Electronic Commerce Europe Association (ECEA), the Organization for the Advancement of Structured Information Standards (OASIS), the Taipei EDIFACT Committee, and the Webforce International.
