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Legal aspects of electronic commerce

Electronic contracting: provisions for a draft convention

Comments by the International Chamber of Commerce

Note by the Secretariat

The Secretariat has received comments on the Working's Group's consideration of a possible new international instrument on electronic contracting by a task force established by the International Chamber of Commerce. The text of those comments is reproduced in the annex to this note in the form in which it was received by the Secretariat.





International Chamber of Commerce

The world business organization

Department of Policy and Business Practices

Commission on E-Business, IT and Telecoms

Task Force on International Harmonization Efforts

ICC Task Force on International Harmonization Efforts position on UNCITRAL and e-contracting issues.

1. Introduction

The International Chamber of Commerce (ICC) is grateful to UNCITRAL for the invitation to provide views regarding current UNCITRAL proposals for the legal framework for electronic contracting.

ICC understands that e-contracting developments within UNCITRAL currently follow two strands that are not mutually exclusive. The first is the proposal to produce a draft convention relating to electronic contracting (set forth in UN Document [A/CN.9/WG.IV/WP.95](#)), and the second is a proposal to draft an “omnibus” convention to remove barriers to e-commerce in existing international conventions caused by writing and form requirements (set forth in UN Document [A/CN.9/WG.IV/WP.94](#)).

The purpose of this paper is to outline how ICC as the world’s leading international business organization, with long experience in self-regulatory rule-making, might assist the UNCITRAL Electronic Commerce Working Group in its current work, and how such cooperation might work in practice.

2. ICC’s Role in Business-Based Rule-Making

Since its inception, ICC has facilitated the creation by business of commercial rules which have become part of the legal fabric of international commerce. Examples of ICC rules include ICC's Uniform Customs and Practice for Documentary Credits (UCP 500, the rules that banks apply to finance billions of dollars worth of world trade every year) and ICC’s International Commercial Terms (Incoterms 2000, standard international trade definitions used every day in countless thousands of sales contracts). ICC also drafts model contracts, which give parties a neutral framework for their contractual relationships, and which are drafted without expressing a bias for any one particular legal

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system. Major intergovernmental organizations (IGOs) such as UNCITRAL, UN/ECE and the World Bank endorse and actively support the use of several such ICC rules.

ICC model contracts and clauses, uniform rules and voluntary codes are elaborated after extensive consultation with business worldwide. They provide practical and efficient tools to facilitate international business transactions – for the benefit of both businesses and their governments. ICC has members in over 140 countries worldwide, and the drafting of business rules by ICC is based on global participation.

ICC and its members continue to update and revise the ICC rule base to make sure it reflects current business practices in a fast changing business environment. An example of how ICC approaches these issues is the eUCP, a response to the growing number of electronic documents being used in international trade.

The eUCP is the electronic supplement to UCP 500. The 12 Articles of the eUCP work in tandem with UCP 500 where electronic presentation of documents occurs. They cover a range of issues common to electronic documents, including format, presentation, originals and copies and examination of electronic records. They also contain highly useful definitions of terms – such as “appears on its face” or “place for presentation” – that have different meanings in the paper and electronic worlds.

GUIDEC and GUIDEC II are other examples of ICC guidelines for electronic transactions. The GUIDEC framework deals with the use of digital signatures and the role of certification authorities. GUIDEC enhances the ability of the international business community to execute trustworthy digital transactions utilizing legal principles that promote reliable digital authentication and certification practices.

3. Scope and Format of an E-Contracting Instrument

Following consultation with its electronic commerce and commercial law and practice experts, ICC believes that the following principles should guide any work on the international legal framework for electronic contracting:

- It should be based on a careful assessment of need. Thus, ICC believes that before making a decision on the scope and format of any initiatives in this field, there is a need to carefully consider and analyze what problems do international commercial players currently face in using electronic contracting, if any, and how they best can be solved.
- It is important that any instrument should avoid giving the impression to the international commercial community that electronic contracting is in some fundamental manner different from international contracting conducted through other media. It is true that the Internet may well raise certain specific questions, which have not arisen before in quite the same way. It is equally true, however, that international commerce has over many years adapted with remarkable speed and



pragmatism to other technological advances without re-visiting the fundamentals of international commerce. It thus follows that a new instrument should provide solutions to media-specific problems, rather than a comprehensive code for international commerce on the Internet.

- It is important that any instrument be as useful, practical and affordable for large international commercial entities as for small or medium-sized entities. An instrument addressed solely towards the former may be unsuitable for the latter, and one directed solely towards the latter may substantially reduce its utility.
- Any instrument should be based on the contractual autonomy of the parties who will, through an assessment of their own needs, risks and experience, be able to organize their commercial dealings within an electronic environment in a manner which best suits their expectations and requirements. These requirements will change from customer to customer and, given the speed of technological advance, from time to time.
- Such an instrument should concentrate on problems that arise in the sphere of business-to-business commerce (which is also UNCITRAL's traditional mandate), rather than also encompassing consumer issues.

ICC believes that it would presently be difficult to realize these goals within the context of an international convention, and that a convention such as that proposed in WP 95 would be premature, for several reasons:

- It could be dangerous to adopt such a convention without first isolating the specific practical problems, if any, which business currently faces regarding electronic contracting, since this would present the risk of not addressing the actual problems that exist in practice while arguably implying comprehensiveness.
- The drafting of a convention can take a significant amount of time, as does the implementation of such a convention into national law.
- A convention is difficult to amend if specific provisions of it turn out not to be useful or to create unanticipated problems.

These considerations do not necessarily mean that there is no need for an international legal framework for electronic contracting, but that such a framework must focus on actual, practical problems specific to the electronic medium, that it must be flexible, and be capable of being adopted swiftly.

4. Possible ICC Work on Electronic Contracting

ICC is willing to explore the possibility of drafting an instrument which would assist companies worldwide in providing increased legal certainty for their electronic contracting. Such work would



concentrate on issues specific to the electronic medium. ICC is currently seeking to identify the critical media-specific issues that are most important to businesses in relation to electronic contracting.

Based on preliminary investigations, the following appear to be examples of such issues:

- When does an offer “reach” the offeree? Under most existing legal instruments an offer becomes effective when it reaches the offeree, and may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer. However, in an electronic context with EDI messages, e-mails, Instant Messaging (IM) and communication via web sites it is not always clear exactly when a message has reached the addressee.
- Buyers and sellers are often faced with requirements to give the other party notice of certain events or situations. In an electronic context questions arise in terms of form requirements to such notices. Can a party for instance give notice by using a GSM phone and Short Messaging System (SMS)? Will an e-mail in all cases be considered a valid notice?
- The risk of making mistakes may be higher in an electronic context as it seems easier for a contracting party to accidentally click the wrong button rather than signing a document by mistake. On the other side, electronic applications provide better possibilities for validating data, which can prevent misunderstandings due to missing or unclear information such as for instance amounts, dates and times.

It would be premature at this time to decide precisely which regulatory vehicle would be most appropriate for the resolution of issues such as these. However, ICC is planning to address them through the following steps:

- ICC is planning to collect views from a representative sample of international commercial players, drawn from an appropriate sectoral and geographical cross-section, regarding the practical problems, which are currently faced in the use of electronic technology in international commerce. Views will also be sought as to the type of instrument which might best assist in providing solutions to such problems. In particular, ICC will hold a meeting in the beginning of April 2003 with business representatives. ICC hopes to be in a position to provide UNCITRAL with the conclusions from this meeting at the 41st Session of the UNCITRAL Working Group at the beginning of May 2003.
- Based on these views, ICC could produce an instrument to guide businesses when contracting electronically. It must be stressed that the exact scope and format of this instrument will depend on the analysis mentioned above, but could include some combination of the following: 1) a



guidance document on how to structure electronic contracts so as to ensure their probity; 2) a set of uniform customs and practices which businesses could incorporate, either directly or by reference, into their electronic contracts or electronic contracting practices; or 3) model clauses or contracts to be used in the electronic medium.

Such an exercise by ICC would have the following advantages as compared to a convention:

- It could be finished more quickly, and would thus be available for use by business more swiftly.
- It could be used more flexibly; i.e., a company could decide to use the ICC instrument in all its electronic contracting, only in certain electronic contracts, or not at all.
- It could be amended more swiftly if problems were to arise with specific provisions.

It should be emphasized that ICC would not perform this work in isolation, but would need to consult extensively with the members of the UNCITRAL Working Group in drafting it. If, after promulgation of a business self-regulatory instrument, the Working Group felt a convention or another type of legal mechanism, was a desirable way to address additional issues, the assessment conducted in relation to the self-regulatory initiative would nonetheless help to define the appropriate scope of such instrument.

5. Timeline

ICC believes that it would be premature to base its work on an inflexible time schedule, since it is difficult to foresee now the exact progress of the work. However, based on its experience with similar projects, ICC believes that the following is a realistic time-frame for the work:

- 9 April 2003: ICC will hold a meeting in Paris with representatives of companies engaged in electronic contracting to gain a more detailed assessment of their views on the need for further international regulation in their area.
- May 2003: ICC will participate in the meeting of the Working Group in New York and discuss the proposal further with members.
- June 2003: ICC will begin drafting of the document.
- October 2003: At the next meeting of the Working Group, ICC will report on its progress.
- 2004: Work will be completed in time for either the spring or fall 2004 meetings of the Working Group.

During the drafting process, ICC would consult closely with the members of the Working Group and the UNCITRAL secretariat by participating in the Working Group's meetings, and by e-mail, telephone, and Internet consultation to keep the members apprised of its progress and to solicit their input into the document.