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Draft Convention on the Use of Electronic Communications in International Contracts

Comments received from Member States and international organizations

Addendum

Note by the Secretariat

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II. Compilation of comments

A. States

9. Belgium

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The present contribution focuses on paragraphs 4 to 6 of article 9 of the draft convention, which define the electronic equivalent of an original and which, in the view of the Belgian delegation, constitute the main difficulty which the draft still poses.

The Belgian delegation considers that these three paragraphs, which it has not been possible for the Working Group to examine in depth, should not be included in the draft convention.

The Belgian delegation in fact feels that it would be inappropriate for the draft convention to incorporate provisions that legally establish the electronic equivalent of an original when those provisions do not address the question of electronic equivalents for the transfer of rights by means of documents of title or negotiable instruments (which are excluded under article 2, paragraph 2, of the draft) and such transfer is specifically dependent on possession of an original document.

As indicated in the Secretariat's latest study on this issue (A/CN.9/WG.IV/WP.90), the particular problem involved in creating an electronic equivalent for the transfer of a paper-based original is how to provide a guarantee of uniqueness equivalent to possession of the original of a document of title or negotiable instrument. That study and the note by the Secretariat accompanying the present draft convention state that it has so far not been possible to develop a wholly satisfactory solution to ensure this "singularity or originality" (A/CN.9/577/Add.1, para.37).

Under such circumstances, it seems surprising that article 9, in paragraphs 4 and 5, should purport to define the electronic equivalent of an original when it does not make such equivalence subject to the requirement of singularity of the original, which is intrinsically linked to the very function and nature of an original, and will thus be unable to address the question of the transfer of a negotiable instrument.

In order to avoid any inconsistency in this respect, the Belgian delegation thus considers it preferable to deal simultaneously, in a single overall approach, with the question of the electronic equivalent of an original and that of electronic equivalents for the transfer of rights by means of negotiable instruments. In this connection, the Working Group's current work on transport law aimed at defining an electronic equivalent of negotiable transport documents should naturally be taken into consideration.

The Belgian delegation also notes that paragraph 6 of article 9 excludes the application of paragraphs 4 and 5 if a party is required to *present* certain original documents for the purpose of claiming payment, whereas paragraph 4 specifically refers to the possibility of *presenting* information as one of the requirements for an electronic communication to be recognized as having the value of an original.

The Belgian delegation sees this as further evidence of the fact that paragraphs 4 and 5 of article 9 cannot, as they stand, be regarded as satisfactorily addressing the question of the electronic equivalent of an original.
