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The new regime for international electronic contracting

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Abstract

This paper analyses the most important provisions of the Convention on the Use of Electronic Communications in International Contracts adopted last year by the United Nations General Assembly. This treaty is the first international agreement drafted specifically for international electronic commerce. Although it is not binding yet, it is important for Internet merchants to know what changes does it bring.

Keywords

Electronic contracts, Convention, Electronic commerce law, Mistake, Offer

INTRODUCTION

On 23 November 2005, the United Nations General Assembly adopted the Convention on the Use of Electronic Communications in International Contracts (United Nations 23 November 2005). In July 2006, during the official signature event in New York important Asian states such as China and Singapore signed it. Other signatories include smaller states such as Sri Lanka, Lebanon, Senegal, Central African Republic, Madagascar and Sierra Leone. Australia took a more cautious approach and decided to leave more time for a careful assessment of its impact. Similarly, the European Union is considering the accession to this Treaty as an organization pursuant to article 17, which permits regional economic organizations to become party to the Treaty. However, the Convention is not binding yet as it is subject to ratification, acceptance or approval by three signatory states.

The present Treaty is the first international agreement drafted specifically for electronic commerce. The most important commercial treaty specifying parties rights and obligations with respect to international trade in goods (known in Australia as CISG or 1980 Sale of Goods Convention- see (UNCITRAL 1980) was drafted in pre-Internet era (Bianca and Bonell 1987; Audit 1998; Eiselen 1999). It does not apply to trade in services and refers to technologies such as faxes. On the other hand, Model Law on Electronic Commerce or the Model Law on Electronic Signatures were not meant to be binding legal acts – only blueprints for national legislators (UNCITRAL 1996; UNCITRAL 2001). Other developments such as Council of Europe Convention on Cybercrime (Council of Europe 23 November 2001) or 1996 WIPO Treaties are not concerned with electronic commerce. Therefore, the new Convention can fill a regulatory gap that has existed in this respect.

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 global electronic trade from business perspective. It was drafted by the United Nations Commission on International Trade Law Working over six sessions since 2002. International Chamber of Commerce also participated in the drafting process, but the Internet community was excluded and it is probably one of the main reasons for the low awareness of its existence.

The topic of this paper is of legal nature, therefore legal tools of analysis will be adopted. However, the contribution will attempt to present the provisions of the treaty 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. The Commission which drafted this Convention is the most active organization in the area of electronic commerce law (UNCITRAL). The present contribution will also draw upon earlier analyses of this convention (Polanski 5-7 June 2006; Chong and Chao 2006; Connolly and Ravindra 2006; Polanski 2006).¹

The first part will present some basic facts about the Convention including its aim, scope of application and its content. The second part will be devoted to the analysis of specific provisions of the Convention on the recognition of electronic contracts, treatment of an interactive website as an invitation to make offers and

¹ This paper is a shorter, less legally focused and more business-oriented version of my other article „International electronic contracting in the newest UN Convention” to be presented during IBLT international conference in Copenhagen, Denmark in December 2006.

provision on error in contracting. In the third part, an attempt will be made to assess its advantages and disadvantages for global electronic commerce.

MAIN FEATURES OF THE CONVENTION

The Convention consists of Preamble and 25 articles. It is organized into four chapters. The first part specifies under what circumstances the Convention applies. The second chapter contains general provisions such as definitions of the terms used. Chapter III is the most important and 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 standard final provisions.

The aim of the Convention

The purpose of the Convention is to offer practical solutions for issues related to the use of electronic means of communication in international contracts concluded between professionals (B2B). The drafters of this instrument wanted it to apply not only to electronic contracts *per se* but also to communications made during the negotiations stage and partially electronic contracts (UNCITRAL 17 March 2006b). The Convention is based on two principles of functional equivalence (which assumes that paper-based transactions and electronic transactions should be treated equally) and technology neutrality (which assumes that none of the technologies is favored by law).

In particular, the aim of the Convention is to remove legal obstacles to electronic commerce, including those which arose under other instruments (UNCITRAL 11- 22 October 2004). The treaty removes obstacles to e-commerce found in other international conventions adopted before the Internet era. As a result, the rules of older conventions such as 1980 Vienna Convention on International Sale of Goods or 1958 New York Convention on International Arbitration would be given full effect in case of a dispute involving electronic exchange of messages. For example, the term "writing" as used in the 1980 Sale of Goods Convention would be extended to cover electronic writing and therefore conventional rules on formation of contracts and rights and obligations of parties would apply. It is important because entrepreneurs could be certain of legal principles that a court would apply to a submitted dispute. The only condition is that an online company has a place of business in a contracting state of this Convention. In consequence, companies having their places of business in a contracting state to this Convention would have the advantage over companies located in other states because they could be certain that electronic contracts would be honored by courts despite the lack of tangible form (Boersma 1998). This is a major reason for the adoption of this instrument. However, the Convention also contains elaborate rules that permit states to change the scope of the Convention and hence, introduce the legal uncertainty that it aims to avoid (Connolly and Ravindra 2006).

In general, however, 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. Without an attempt to broaden the scope of older conventions, international e-commerce would be left with a very limited legal framework, which would not guarantee legal security. It is so at least with respect to written norms, as there are numerous unwritten Internet trade usages particularly in the area of online contracting, security and property that could help to fill in a regulatory gap (Polanski 5-7 June 2006).

Sphere of application

The Convention regulates the use of electronic communications in electronic contracting between parties whose places of business are in different states. "Electronic communication" is defined as any statement, declaration, demand, notice or request, including an offer and the acceptance of an offer, made by electronic, magnetic, optical or similar means in connection with the formation or performance of a contract. The term contract is also given a wide meaning to include not only contracts of sale or services but also e.g. arbitration agreements. As it was mentioned earlier, it also includes communications made during negotiations and after the contract has been performed. Nationality or character of online entrepreneurs (civil or commercial) is irrelevant. In other words, the Convention applies to any transactions performed electronically provided that commercial parties are located in different states.

In general, the Convention will always apply to contracts between parties located in two states that are contracting states. It will also govern the dispute if only one party is located in a state that ratified this Convention. However, the provisions of the new Convention will only be used in a dispute involving international electronic commerce if the laws of a contracting state applied to the underlying transaction (UNCITRAL 17 March 2006a). This requirement is not explicitly stated in the Convention so it may be difficult for entrepreneurs to understand its rationale. In other words, parties to an electronic contract can be located in any two states but at least one of these states must be the contracting state or the laws of that state must point to

the law of the other contracting state. 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.

The Convention requires that all online companies must have their places of business in different states, otherwise it will not apply. Place of business is defined 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. It is one of the drawbacks of this instrument, since purely virtual organizations are not rare.

Types of transactions covered

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. Therefore, any contracts concluded between professional party and a consumer (B2C) or between consumers themselves (C2C) or between consumers and a professional party (C2B) are excluded from the scope of the Convention. The reason for such approach is that modern legal systems provide exclusive consumer protection, which cannot be contracted out (Quirk and Forder 2003; Prins June 2003). However, states might extend the application of the conventional rules to consumer transactions (Chong and Chao 2006).

The sphere of application of the Convention to B2B e-commerce is very broad. It is applicable to transactions of sale and to contracts other than sales such as barter. More importantly, the new Convention also covers transactions in services and information. Previous international trade instruments such as aforementioned 1980 Vienna Convention on Contracts for the International Sale of Goods was limited only to professional contracts of sale. 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.

What is important for Internet merchants, the Convention underlines the importance of party autonomy. It means that online entrepreneurs are free to exclude the application of this Convention or derogate from or vary the effect of any of its provisions. In other words, the conventional rules will be applicable under the condition that private parties have not modified or excluded all of its provisions.

Interpretation

The Treaty provides guidance on its interpretation. 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 - as in the 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 (Polanski, July 2003). In addition, this situation introduces uncertainty because merchants will still have to follow trade usages in transactions involving international sale of goods.

OVERVIEW OF THE CONVENTION

The most important provisions on electronic commerce can be found in Chapter III of the Convention titled: "Use of electronic communications in international contracts." The Convention specifies the requirements for electronic writing, signature and originality based on 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 and read they would be considered as being written down. No signature is required.

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 test of reliability requires, for instance, a reference to trade usages and customs (UNCITRAL 22 March 2006). The provision is very general and certainly embraces all forms of electronic signatures such as biometric or PKI-based signatures. However, merchants should be aware that national laws might prescribe more stringent requirements (e.g. the use of digital signatures with qualified digital certificates).

Another 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.

The Convention contains novel 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 rather than a recipient as in the case of the Model Law on Electronic Commerce. The time of receipt in turn, is the time when it becomes capable of being retrieved by the addressee at a designated electronic address. 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. Other important provisions will be discussed in detail below.

The Convention on e-contracting also 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.

Validity of electronic contracting

The Treaty confirms a well established principle of 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."

However, this provision should not be treated as a rule establishing the absolute validity of electronic communications because there may be other reasons, other than an electronic form, that may render the electronic communication invalid (UNCITRAL 22 March 2006). As in the case of electronic signatures, national laws of the contracting states will be decisive in this respect.

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, agent-mediated transactions are given full recognition in international law (Weitzenboeck 2001).

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 (Quirk and Forder 2003). 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.

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.

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.

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 and does not deal with many substantive issues that are left for national legislators to deal with. 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. It should further enhance confidence and trust in electronic commerce in international trade. Furthermore, it could also serve as a useful basis to national legislators to simplify and enhance various domestic rules that applied to electronic commerce. Therefore, it is advisable for all states to ratify this Convention without reservations in order to bring more certainty and predictability to modern Internet-based trade.

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