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Draft Convention on the Use of Electronic Communications in International Contracts

Compilation of comments by Governments and international organizations

Addendum

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II. Compilation of comments

A. States

2. Argentina

[Original: Spanish]

[28 April 2005]

I. The term "parties", which in the draft convention under consideration is used in reference to persons bound by a contract, might be confused with the concept of "Parties" which in treaty law is used in reference to subjects of international law who are bound under an international convention. For that reason, it would be appropriate to refer to the "parties to a contract".

II. In the explanatory notes on the draft convention, the following remarks appear in section D (form requirements): "… party autonomy did not mean that the draft convention empowers the parties to set aside statutory requirements on form or authentication of contracts and transactions."

It is considered appropriate that the substance of this explanation should be contained in the text of the convention, possibly being inserted in article 3 or in article 9.

III. Also with regard to party autonomy or the principle of freedom of form, which is incorporated specifically in article 9 of the draft convention, we feel that a court might question the validity of an international contract if the method employed to validate its authorship and integrity and prevent its repudiation were not sufficient to provide proof of the juridical act. A contract concluded by means of electronic communications is a digital document which meets the written form requirement, while it might additionally be necessary to evidence its existence by means of some authentication procedure.

However, from a reading of the documents referred to above, the recommendation is that the validity of an electronic communication should not be made conditional upon the electronic signature requirement. It could here be construed that, if no requirements are laid down as regards the contract form, a suitable declaration alone will then be sufficient for the act to have legal consequences.

But the parties' agreement on this point could not nullify the statutory form imposed, which means that the parties may be subject to the principle of freedom of form where the law establishes nothing in that respect or where the parties decide not to strengthen or increase the form conditions by adding others to them, which would have value and be binding on the parties to the contract.

Accordingly, many transactions might be deemed invalid if they are not signed by the parties, and the absence of a signature or the use of weak mechanisms for evidencing authorship and integrity could frequently give rise to repudiation of the communication or contract.

In that case, we believe that, if we are dealing with an international contract, it is important to establish a reliable method that will identify who is sending an

electronic communication so that it can be determined with certainty that the communication in question originated from the sender.

However, the draft text refers solely to the use of a method that is as "reliable" as appropriate to the purpose for which the electronic communication was generated. That could give rise to confusion since, if each party uses a reliable method that it considers appropriate, that disparity will mean that the other contracting party may be subject to a different legal regime, with a standard of protection that could be higher or lower. The logical consequence of the foregoing is a possible increase in the level of legal uncertainty between the parties to a contract and commercial unpredictability in international contracts.

We believe that the electronic signature is the most reliable authentication requirement and the regime should consequently not be made flexible by favouring other methods that might prove less reliable.

It is therefore suggested that the authorship and integrity requirement should be strengthened, in order to prevent repudiation of an electronic communication, by replacing paragraph 3 of article 9 with the following wording:

> "Where the law requires that a communication or a contract should be signed by a party, or provides consequences for the absence of a signature, that requirement is met in relation to an electronic communication if a reliable electronic signature is used in order to give assurance as to the authorship and integrity of the information contained in the electronic communication.
>
> "An electronic signature is considered reliable if it meets the following conditions:
>
> "(a) If the signature creation data are linked to the signatory and to no other person;
>
> "(b) If the signature creation data were, at the time of signing, under the absolute control of the signatory and of no other person;
>
> "(c) If the signature is verifiable; and
>
> "(d) If any alteration to the content of the electronic communication, made after the time of signing, is detectable."