



General Assembly

Distr.: Limited
1 March 2001
English
Original: French

United Nations Commission on International Trade Law

Working Group on Electronic Commerce

Thirty-eighth session

New York, 12-23 March 2001

Legal aspects of electronic commerce

Proposal by France

Note by the Secretariat

Following the publication of document A/CN.9/WG.IV/WP.89, the Secretariat received a proposal by the French delegation, the text of which is reproduced in the annex to this note in the form in which it was received by the Secretariat.

Annex

Legal barriers to the development of electronic commerce in international instruments relating to international trade: ways of overcoming them

Note by France

1. The French delegation wishes to express its appreciation of document A/CN.9/WG.IV/WP.89, which is of high quality, and to make the following observations on the subject that it deals with.
2. Allowance should be made for electronic equivalents, not only with respect to certain specific international treaties currently in force but also with respect to other instruments. While the aim is to enable the evolution of treaty instruments that have already been concluded, it is also to incorporate electronic equivalents in new treaty instruments concluded in the area of international trade and to facilitate the evolution of non-treaty instruments (models of uniform laws, standard rules, regulations and recommendations of international organizations).
3. As emphasized in document WP.89, adopting a variety of procedures for revising treaty-related instruments is unlikely to prove satisfactory because each revision would depend on the specific procedure provided for in the treaty and the procedure could turn out to be lengthy. Also, the success of the revisions would be very much a matter of chance. The fact that, after renegotiation, the revisions would not necessarily result in a uniform definition of the terms “writing”, “signature” and “document” casts even more doubt on the prospects for success of such a process.
4. It should however be noted that the intended objective is not to interpret, modify or revise earlier agreements; it is far broader in scope, namely to facilitate the use of means of communication other than paper-based documents in international trade.
5. The French delegation is therefore of the opinion that it is advisable to draft a text that is as general as possible and obviates the need for specific revisions instrument by instrument. Furthermore, since the instruments that have already been drawn up are often mandatory in nature (international treaties) what needs to be concluded in this case is again a mandatory instrument. It is therefore necessary to conclude an international treaty. The conclusion of one treaty only is recommended as a sensible solution to prevent the proliferation of competing definitions in different treaties. The definitions contained in the UNCITRAL model law might constitute a basis for negotiation.
6. A new agreement allowing for electronic equivalents of writing, signatures and documents in international trade is not incompatible with earlier treaties on international trade which are based on the conventional media. There is no real contradiction between the law prior to the conclusion of the new agreement and the new agreement introducing electronic equivalents. A clause in the new treaty should indicate this explicitly. Article 30, paragraph 2, of the Vienna Convention on the Law of Treaties of 23 May 1969 indicates that when a treaty specifies that it is not

to be considered incompatible with another treaty, the provisions of that other treaty prevail.

7. An agreement that interprets an existing treaty would most probably not achieve the intended objective. It is not a case of negotiating an agreement that would interpret, modify or amend existing treaties, but of concluding a new agreement allowing for electronic equivalents. Including the list of earlier treaties in the new agreement should therefore be avoided. Thus, the will of the States set to be parties to the new agreement will be taken into account, without any implication that the non-participation of other States in the new agreement might be considered a rejection of electronic equivalents.

8. UNCITRAL would certainly be the appropriate framework for elaborating such a document as it has already begun to consider these issues. The simplified procedure would doubtless facilitate the rapid entry into force of the new agreement by simple signature, but States should nevertheless be allowed to abide by their domestic procedures, and the possibility of resorting to other procedures (ratification, acceptance, approval and accession) should not be ruled out at the present juncture. The important thing is for the new agreement to enjoy the broadest level of participation possible.

9. At the time of signature of the agreement, the adoption of a United Nations General Assembly resolution encouraging States to become parties to it would be useful in highlighting the importance of recognizing new means of electronic communication in order to promote international trade. Other organizations might also be enlisted (recommendation of the WTO General Council, OECD recommendation, ICAO recommendation).

10. The increasing number of these legal texts that are binding to varying degrees and the conclusion of a new treaty would very likely help to engender a practice and an *opinio juris* resulting in the emergence of a new customary rule allowing for electronic equivalents in the context of international trade.