



General Assembly

Distr.: Limited
11 December 2001

Original: English

United Nations Commission on International Trade Law

Working Group on Electronic Commerce

Thirty-ninth session

New York, 11-15 March 2002

Legal aspects of electronic commerce

Electronic contracting: provisions for a draft convention

Comments by the International Chamber of Commerce

Note by the Secretariat

Following the publication of document A/CN.9/WG.IV/WP.95, the Secretariat received comments on that document by an ad hoc expert group 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

REPORT ON DRAFT UNCITRAL CONVENTION ON ELECTRONIC CONTRACTING

Ad Hoc ICC Expert Group*

December 5, 2001

* Members of the Expert Group have included Mark Bohannon, Charles Debattista, David Fares, Christina Hultmark Ramberg, Christopher Kuner, Anna Nordén, Heather Shaw, and Aleksandar Stojanoski. The views expressed herein are the personal opinions of the members of the Expert Group, and not necessarily those of the organisations they represent.



EXECUTIVE SUMMARY

The ICC Ad Hoc Expert Group welcomes the Note by the Secretariat A/CN.9/WG.IV/WP.95 and the Working Group's desire to create increased legal certainty for online contracting. ICC has received a number of responses to a questionnaire it sent out to companies, giving them the opportunity to express their opinions in the field of electronic commerce and electronic contracting; the questionnaire is reproduced in the Appendix at the end of this report, together with the responses received to it at the time this report was finalised. The views of the ICC Ad Hoc Expert Group expressed in this report have been influenced by the responses received, which generally favour harmonisation as a means for reducing legal uncertainty in online contracting. The Expert Group will continue to update the Appendix as further responses are received, and will be happy to make the results available to the UNCITRAL Secretariat and Working Group.

The Expert Group believes it is important that the principles of freedom of contract and party autonomy be very strongly anchored in the convention, in order to avoid misunderstandings, and to ensure that business has confidence in it. The Expert Group also suggests that the Working Group carefully consider whether the convention should apply only to electronic contracts, or to commercial contracts in general, and to keep in mind that there may be a number of problems in regulating electronic contracts separately from all commercial contracts. The Expert Group also believes that it would be important to clarify the interaction between any convention on electronic contracting and the United Nations Convention on Contracts for the International Sale of Goods (hereafter "the United Nations Sales Convention").

The Expert Group agrees that it is appropriate for the convention to address also contracts outside the sphere of the sale of goods. However, the question of whether the convention should also cover transactions in intellectual property (such as licensing transactions) should be studied further. The Expert Group found no consensus on whether transactions in intellectual property should be included in the potential work. As a matter of pragmatism the Expert Group recommends that the UNCITRAL negotiations on a convention exclude consumer contracts, by use of the same definition as in the United Nations Sales Convention.

With regard to whether the convention should cover domestic or international transactions, the Expert Group finds that the concept described in The Secretariat's Note, whereby the enacting states may choose not to make the convention applicable to domestic transactions, but where the default position of the convention is that it is applicable also to domestic transactions, is worthy of further consideration. The Expert Group favours the adoption of legal rules that would make it easier to ascertain the location of the parties, as long as certain dangers inherent in such rules are avoided.

In terms of substantive legal issues concerning the formation of contracts, the Expert Group finds it particularly important to achieve harmonisation in the areas of conclusion of contracts, incorporation of terms, mistake and input errors.



1. INTRODUCTION

The ICC Ad Hoc Expert Group welcomes the note by the UNCITRAL secretariat “Electronic contracting: provisions for a draft convention” of September 20, 2001 (A/CN.9/WG.IV/WP.95 hereafter referred to as “the Secretariat’s Note”, available at <http://www.uncitral.org/en-index.htm>) and the Working Group’s desire to create increased legal certainty for online contracting. At the UNCITRAL Commission meeting in July 2001, ICC was asked to produce a report presenting business’ views on the need for a convention on electronic contracting. In order to gain a thorough understanding of business’ view, ICC sent out a questionnaire giving companies the opportunity to express their opinions in the field of electronic commerce in general, and electronic contracting in particular. The questionnaire was sent out to a wide variety of companies in various business and geographic sectors around the world; the questionnaire is reproduced in the Appendix at the end of this report, together with the responses received to it at the time this report was finalised, which generally favour harmonisation as a means for reducing legal uncertainty in online contracting. The views of the Expert Group expressed in this report have been influenced by the responses received. The Expert Group will continue to update the Appendix as further responses are received, and will be happy to make the results available to the UNCITRAL secretariat and Working Group.

This report is drafted based on the assumption that there is a need for a convention (or other international instrument) dealing with the issues of contracting. It will not further discuss the need for a convention, but will focus on the scope of such a convention as well as on the substantive issues a convention should deal with.

The objective of this report is not to be a response to the Secretariat’s Note, but rather to highlight the main issues. At the same time, since most issues of relevance to business have been identified as important areas also by the Secretariat, the Expert Group will use The Secretariat’s Note as a reference so as to avoid reiterating the legal background.

This report poses several questions to the Working Group. It is our belief that the Working Group should discuss and consider these questions prior to embarking on its work, so as to appropriately define the scope of the project. The Expert Group will, at the same time, continue its outreach to the broader business community to further develop its views on these questions. ICC is keenly aware of the commercial significance of the UNCITRAL project, and therefore hopes to continue actively to participate in this work and to provide more detailed comments on the project as it develops into a draft. In so doing, ICC will be able to draw on its wide international base of practical business experience.

2. SPHERE OF APPLICATION

2.1 Party Autonomy and Freedom of Contract

As a preliminary comment, the Expert Group would like to stress that, in its view, it is important that the principles of freedom of contract and party autonomy be very strongly anchored in the convention, whatever form it may take. This should be non-controversial, since the United Nations Sales Convention already recognises these principles, and there is no suggestion in the Secretariat’s Note



that the situation should be different in the new convention. However, for avoidance of misunderstanding, and to ensure that business has confidence in the convention, the Expert Group favours a strong affirmation in it that its rules are default rules that parties may derogate from. The Expert Group also believes that it would be important to clarify the interaction between any convention on electronic contracting and the United Nations Sales Convention.

2.2 Special regulation for e-contracts

(See the Secretariat's Note paras. 10-12)

The aim of UNCITRAL's work on an international instrument dealing with certain issues of electronic contracting is to eliminate legal barriers to international transactions that exist due to the international disharmony of law. The first question to ask is whether these barriers are particular for electronic contracting, or whether they exist for all international commercial contracting.

Many of the responses to the questionnaire have expressed the view that contracts concluded by electronic communication should preferably not be regulated differently from contracts concluded by other means of communication. This is a point of fundamental importance, and the Expert Group suggests that the Working Group carefully consider whether the convention should apply only to electronic contracts, or to commercial contracts in general. In particular, the Expert Group would like to point out that there are a number of problems in regulating electronic contracts separately from all commercial contracts:

- a. The Expert Group would like to question the definition as suggested in paras. 10 and 11 of the Secretariat's Note and in Article 1 of the Preliminary draft convention attached as Annex I to the Secretariat's Note, which refers to "contracts concluded or evidenced by means of data messages". In fact, many contracts are concluded by a mixture of oral conversations, telefaxes, paper contracts, e-mails, and web communication. Thus, the term "contracts concluded or evidenced by means of data messages" proposed in the Secretariat's Note could create practical problems in determining to what extent the convention is applicable.
- b. The practical problems encountered in relation to electronic contracts are in many cases not specific to the electronic environment, but arise in all international dealings, whether electronic or not. While it is true that some adaptation of traditional contracting rules may be needed to accommodate issues that arise with particular frequency in electronic commerce (such as the definition of "sent and received"), this does not mean that some of these issues may not be just as troublesome in the context of "traditional" contracting. Thus, there is reason to consider having the convention address the applicable legal issues in a media-neutral way.

2.3 Should the convention be applicable to goods only?

(See the Secretariat's Note paras. 13-14, 20-22)

The Expert Group agrees with paras. 13-14 of the Secretariat's Note that it is appropriate for the convention to address also contracts outside the sphere of the sale of goods. It is particularly important that the convention also cover transactions in services.



Paras. 20-22 of the Secretariat's Note suggest that the convention should also include transactions in intellectual property, such as licensing transactions. The Expert Group would like to point out that transactions in intellectual property may give rise to different issues than those that arise in relation to the sale of goods and services. The Expert Group could not reach consensus on this question, reflecting these substantive and procedural concerns, and believes that it should be studied more carefully by the Working Group.

2.4 Should the convention be applicable to consumers?

(See the Secretariat's Note, paras. 15-19)

As reflected in the responses to the questionnaire, the Expert Group sees a need for guidance with respect to consumer contracts concluded by electronic means. However, as a matter of pragmatism the Expert Group recommends that the UNCITRAL negotiations on a convention exclude consumer contracts, for various reasons. First of all, many States see consumer rights as a matter of *ordre public*, so that it could be very difficult to reach agreement on any substantive rules. Having the convention applicable to consumer transactions would also likely make the deliberations so controversial that there is a substantial risk that no consensus would be reached. Another concern is that it would not be feasible to allow sufficient room for the principle of freedom of contract if consumer transactions were to be included.

As to the means of excluding consumer transactions, the Expert Group would like to recommend that the convention use the same definition as in the United Nations Sales Convention, as suggested in the Secretariat's Note, para. 16. By so doing, it would be possible to benefit from the experiences and case law related to the United Nations Sales Convention. It is possible to arrive at a wide variety of definitions of "consumer transaction". The optimal solution would be if all instruments (national or international) use the same definition, but this will not be the case within the foreseeable future. The Expert Group therefore recommends that UNCITRAL use the same definition in all UNCITRAL conventions.

The United Nations Sales Convention Article 2(a) ("unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use") may create problems in the electronic setting, since the other party's capacity of being a consumer or businessman may be hidden (see the Secretariat's Note, paras. 18 and 19). This problem should be discussed further. The Expert Group recommends that the wordings in the United Nations Sales Convention Article 2(a) referring to the seller's knowledge be included in the new convention.

2.5 Should the convention be applicable to international contracts only?

(See the Secretariat's Note, paras. 25-36)

It is preferable that same rules apply irrespective of whether a transaction is domestic or international. By having the same rules for domestic and international transactions, a business may use the same interface for all its operations, and customers thus become used to this interface in all their dealings. However, the Expert Group acknowledges that such a wide scope of application will create difficulties in reaching consensus in the Working Group. Many states will likely be less willing to



accept and ratify a convention that interferes with their law for domestic transactions. The Expert Group thus finds that the concept described in the Secretariat's Note, para. 36 and draft Article 1 variant A, whereby the enacting states may choose not to make the convention applicable to domestic transactions, but where the default position of the convention is that it is applicable also to domestic transactions, is a potentially useful approach, but that further consideration of this issue is needed before a decision is taken.

The definition of international transactions should be the same as in the United Nations Sales Convention, which will make it possible to benefit from case law that has developed for the United Nations Sales Convention. Moreover, it would generally be good if the conventions were to have the same scope of application in this respect.

2.6 Location of the parties

(See the Secretariat's Note, paras. 37-46)

The Expert Group shares the view expressed in the Secretariat's Note that considerable legal uncertainty is presently caused by the difficulty of determining where a party to an online transaction is located; while this danger has always existed, the global reach of electronic commerce has made it more difficult than ever to determine location. This uncertainty can have important legal consequences, since the location of the parties is important for issues such as jurisdiction, applicable law, and enforcement. The responses to the questionnaire support this view as well.

The Secretariat's Note makes a number of suggestions to deal with this uncertainty, including 1) requiring the parties to a contract concluded electronically to clearly indicate where their relevant places of business are located; 2) establishing a presumption that a party's place of business is the one indicated as such by it; and 3) determining circumstances from which the location of the relevant place of business can be inferred. The Expert Group finds much to support in these suggestions, since they could lead to increased legal certainty, but would like to point out a few potential problems:

- 1) The consequences of a party failing to comply with one of these provisions would have to be considered and well defined. For instance, the Expert Group believes it is important to avoid the situation foreseen in the EU E-Commerce Directive (which is referred to in the Secretariat's Note as the inspiration for some of these provisions) whereby the parties are obliged to fulfil certain informational obligations, but it is not clear what the consequences are if they fail to do so (i.e., whether they can be sanctioned, whether the contract is void or voidable, etc.), since this situation itself creates considerable legal uncertainty.
- 2) As the Secretariat's Note points out, it could be advisable to adopt provisions to avoid situations where a party's indication of a place of business would serve no purpose other than to circumvent the new instrument or trigger its application in cases that would fall outside its scope. However, the Expert Group would like to point out the difficulty of drafting such provisions and the danger of including provisions which are overly complex and limit the parties from legitimately indicating their places of business.
- 3) The Expert Group would also like to warn of the danger of overly-simplistic rules based on indications that may seem to be conclusive, but in fact may have little or no connection with a



party's true place of business (e.g., when a party uses a country-level domain name); the Expert Group is encouraged by the fact that the Secretariat's Note seems to recognise this danger.

3. SUBSTANTIVE ISSUES ON FORMATION OF CONTRACTS

The majority of responses received to the questionnaire recognise that disharmony in law regarding formation of contracts is an obstacle to electronic commerce.

3.1 Conclusion of contracts

(See the Secretariat's Note, paras. 49-54, 63-66)

As described in paras. 64-67 of the Secretariat's Note, the concept of offer and acceptance, although very well established in many jurisdictions, causes problems both from practical and theoretical points of view. The Expert Group would like to recommend that the wording of the UNIDROIT Principles of International Commercial Contracts Art. 2.1 ("A contract may be concluded either by the acceptance of an offer or *by the conduct of the parties that is sufficient to show agreement*") be considered in relation to formation of contract, in order to ascertain and inform the parties that a contract may be concluded also by other means than the offer and acceptance model.

The Expert Group believes that it is important to specify to what extent electronic offers are binding offers or only invitations to treat. In the questionnaire, business has expressed concerns about the present uncertainty in this respect.

3.2 Dispatched and Received

(See the Secretariat's Note, paras. 59-62)

The Expert Group would find it useful to include in the convention rules on when a message is 'received' and 'dispatched'.

3.3 Automated transactions

(See the Secretariat's Note, paras. 71-73)

The Expert Group would like to question the practical need for regulating automated transactions specifically. The issues regulated in draft Article 12 are already, or should be, answered in other draft Articles. The rule on formation follows from draft Article 8 (at least if the wording is amended as proposed above). Errors should be dealt with separately and for all types of electronic mistake, whether in an automated situation or not (see below).

Further, the Expert Group is afraid that it will be problematic to distinguish automated transactions from semi-automated transaction and non-automated transactions, which is another reason for not regulating automated transactions specifically.



3.4 Form requirements

(See the Secretariat's Note, paras. 85-89)

The Expert Group agrees that the convention need not address the issue of form requirements (paras. 85-87 of the Secretariat's Note). The Expert Group sees no need to include articles on signature and writing requirements in the convention, since the convention – like the United Nations Sales Convention – ought to be based on the general rule that no form requirement is needed (paras. 88-89 of the Secretariat's Note) and – like the United Nations Sales Convention – allow for reservations from the convention with respect to form requirements.

3.5 Incorporation of terms

(See the Secretariat's Note, paras. 67-69)

The results from the questionnaire demonstrate that incorporation of terms is an area where business currently sees problems caused by disharmony of national laws. However, incorporation of terms by reference is an oft-debated problem not only in the electronic environment. The decisive question is how much attention needs to be brought to the incorporation for it to be legally valid. This problem remains the same in the electronic environment.

The Expert Group suggests that UNCITRAL try to solve the general problem of incorporation of standard terms with a particular focus on standard terms in the electronic setting. This could be addressed in the convention in a general manner. Guidance can be found in UNIDROIT Principles Articles 2.20, 2.21, and 2.22.

The Expert Group acknowledges the difficulties in solving the battle of forms problems. However, an attempt at solving the problem is included in the United Nations Sales Convention Article 19, which could be repeated and possibly also improved in a new convention.

3.6 Input errors and mistake

(See the Secretariat's Note, paras. 74-79)

The results from the questionnaire show that business also is unsettled by inconsistencies in national law on errors and mistake. The Expert Group would prefer that input errors and mistakes be dealt with in a separate article in the convention.

The convention must clearly indicate that the parties may by their agreement vary the convention's default rule on mistake, i.e., the convention's rule on mistake should not be mandatory. Although it is clear that the convention itself should generally not be mandatory, the Expert Group finds it useful to point this out specifically with respect to electronic mistakes, since some national legislation in this area is mandatory.



Appendix -- Questionnaire and Responses

Questionnaire

ICC distributed the following “questionnaire regarding electronic contracting practices” to companies worldwide in September 2001:

Background

Disharmony between different legal systems creates huge costs for anyone wanting to pursue trade outside their own jurisdiction. In order to avoid the problem of determining the applicable law to electronic contracts the United Nations Commission for International Trade Law (UNCITRAL) is considering the development of legal rules for electronic contracting. While businesses would remain free to agree on their own contracting practices, the UNCITRAL project could result in the development of basic default rules for electronic contracting which could be of fundamental importance for cross-border electronic commerce.

ICC wants to ensure that this important project reflects business realities, and is preparing a report to be submitted to UNCITRAL in November giving an overview of existing electronic contracting practices and analyzing which legal issues would be appropriate for UNCITRAL to deal with. To this end, ICC is approaching companies to learn more about their electronic contracting practices, and to solicit the views of business as to what the proper scope of the UNCITRAL work should be. ICC would very much appreciate if you would take a few minutes to consider the following questions:

Your own practice and experience

Does your company have any experience with electronic contracting?

- a. **If yes:**
 - i. have you been required by suppliers/customers/partners to use electronic means for contracting?
 - ii. have you encountered any problems (legal or practical)?
- b. **If no**, what are the reasons for this (no opportunity/need, infrastructure or security problems, legal uncertainty, etc.)?

Particular examples

The scope of the UNCITRAL project is as yet unclear, but ICC has identified a few issues that create obstacles for electronic contracting and which may be candidates for consideration by UNCITRAL. Keeping in mind that these are only examples, ICC would be interested in your views on the following issues.



A. Contract Formation

At present the rules on formation of contract are different in different countries. The rules on what types of message that are legally binding differ. For instance, a message on a website could be an automatically binding ‘offer’ according to one national law, but not according to another. This disharmony creates a significant problem in the international setting, due to the difficulty of determining applicable law and the lack of international uniformity concerning the binding nature of messages.

1. Do you think it is a problem that the extent to which you are bound by electronic messages differs in different countries?
2. Would it be helpful if the rules on formation of electronic contracts were to be harmonized?

B. Incorporation of terms in the contract

Another area of disharmony is to what extent terms are binding when a contract is entered into online. Take, for instance, the rules as to whether a reference through a hyperlink to another website containing legal terms make those terms part of the contract. Some jurisdictions require an active approval (a clicking on the link or in an OK-box for example), whereas other jurisdictions do not impose such requirements.

3. Do you think it is a problem that the law in relation to incorporation of terms differs in different countries?
4. Would it be helpful if the rules on incorporation of terms in electronic contracts were to be harmonized?

C. *Mistake/Error*

Due to the speed and automation that characterize the use of electronic communications, mistakes are easily made (e.g., instead of ordering shares worth \$ 1,000, you may find yourself bound to order 1,000 shares), whether by the result of human error or due to automated choices made by computers. There is currently uncertainty as to how responsibility for mistakes should be divided, since the traditional rule (which puts most of the burden on the mistaken party) may not be suitable for the electronic environment. Different jurisdictions currently adopt different positions with respect to mistakes in electronic communication.

5. Do you think it is a problem that the law in relation to mistake differs in different countries?
6. Would it be helpful if the rules on mistake in electronic communication were to be harmonized?

D. *Evidence*

Even in the off-line paper world, counterparties frequently find it difficult to identify the terms of their contracts precisely: correspondence may go to and fro, it may or may not mature into an integral “contractual document”, or alternatively there may be more than one “document”



which looks “contractual” because each of the counterparties use their own standard terms. The opportunities for such uncertainty are multiplied in the on-line world, where legal certainty depends not only on the applicable law of contract but also on the law of evidence and on the admissibility of electronic messages as proof of contractual intent.

8. Have you come across any problems due to international disharmony within the area of law of evidence regarding proving
 - a) that a contract is concluded, or
 - b) the terms upon which you have contracted?
9. Would it be helpful if the rules on evidence in relation to electronic transactions were to be harmonized?

Future regulation

10. Do you believe that the issues A-D listed above are problems in practice?
11. Are there other issues that UNCITRAL should be addressing?
12. Would it be useful for business to have an internationally harmonized regulatory framework for electronic contracting (similar to the Vienna Sales Convention)?
13. If such a harmonized regulatory framework is developed, should there be separate rules for electronic contracting or would it be preferable to have the same rules apply irrespective of what medium is used (i.e., for both online and offline contracting)?
14. What are the most urgent issues that you would like governments and international organizations to address in electronic commerce in general, and electronic contracting in particular?

Responses

We have received responses so far from twelve companies representing a wide variety of business sectors and geographic regions. The following is a summary of them, including quotations (underlined) from the responses:

No.	Country	Summary of Questions/Responses
1.	Czech Republic— industrial company	<p>1. Does your company have any experience with electronic contracting? <u>“Yes.”</u></p> <p>2.-9.: Company finds problems in all these areas and would welcome harmonisation work in them.</p> <p>12.: Would it be useful for business to have an internationally harmonized regulatory framework for electronic contracting (similar to the Vienna Sales Convention)? <u>“It will be useful. The rules should be valid in all countries.”</u></p> <p>13.: If such a harmonized regulatory framework is developed, should there be separate rules for electronic contracting or would it be preferable to have the same rules apply irrespective of what medium is used (i.e., for both online and offline contracting)? <u>“Only one regulatory framework should be valid.”</u></p>



2.	Denmark— industrial company	<p>1. Does your company have any experience with electronic contracting? <u>“We have since the middle of the 1980s been promoting the use of electronic contracting towards our (external) customers, as well as internally between business units...Regarding the legal aspects, the greatest uncertainty have been the issues concerning the question of invoicing across borders.”</u></p> <p>2.-9.: Regarding the examples of legal obstacles identified in the questionnaire, the company says as follows: <u>“The international disharmony in the areas of contract formation, incorporation of terms in the contract, mistake/ error and evidence, have not yet been issues which have caused problems in the relation towards our customers. However, it is an area, which deserves more attention, due to the evolution and expected increased use of EDI or electronic contracting, in the near future. The present situation with discrepancy between the different laws in different countries is a latent risk, which undermines commercial relations across borders and continents, causing companies to use an excessive amount of time and money, in their attempt to foresee their legal position. Harmonisation or creation of further default rules would therefore be very welcome as a practical tool in relation to cross border business.”</u></p> <p>10.-14: Regarding future work, the company says as follows: <u>“In our opinion it is a good idea to promote an internationally harmonised regulatory framework for electronic contracting, if and to the extent it reflects business’ need for simple and transparent regulation regarding the division of rights and obligations among the contracting parties. The development of such harmonised regulatory framework, should preferably be based on rules which apply irrespectively of what medium is used, i.e. it should apply for both online and offline contracting, in order to secure the global spreading out and usage hereof.”</u></p>
3.	Denmark— another industrial company	<p>1. Have you been required by suppliers/customers/partners to use electronic means for contracting? <u>“Yes.”</u> Have you encountered any problems (legal or practical)? <u>“Not yet.”</u></p> <p>2.-9.: Company finds problems in all these areas and would welcome harmonisation work in them.</p> <p>11. Are there other issues that UNCITRAL should be addressing? <u>“E-business in general, intellectual rights conflicts vs. domain rights.”</u></p> <p>12. Would it be useful for business to have an internationally harmonized regulatory framework for electronic contracting (similar to the Vienna Sales Convention)? <u>“Yes.”</u></p> <p>13. If such a harmonized regulatory framework is developed, should there be separate rules for electronic contracting or would it be preferable to have the same rules apply irrespectively of what medium is used (i.e., for both online and offline contracting)? <u>“The rules should be the same.”</u></p>
4.	France— large bank	<p>Company notes the importance of territorial identification: <u>“A website may be implemented in one country while the company it serves - whose goods and services it sells - is in another country. The buyer needs to know where he is buying so as to be sure which laws apply. In a similar way, the seller may need to know where the buyer is buying from, on top of where the goods are to be shipped.”</u></p>



5.	Germany— large mail order company	Company sees little need for harmonisation work, since most of the questions have already been solved by the EU E-Commerce Directive and national law.
6.	Germany— another large mail order company	<p>1. Does your company have experience with electronic contracting? <u>“We use electronic means with our customers because this necessity is required by the mail-order market. As far as suppliers are concerned we decided – after a test period – not to use electronic means because the technical requirements for that were too high and the security of data transmission was not guaranteed.”</u></p> <p>2. Do you think it is a problem that the extent to which you are bound by electronic messages differs in different countries? <u>“No, because we and our subsidiaries operate in our individual domestic markets only”.</u></p> <p>3. Would it be helpful if the rules on formation of electronic contracts were to be harmonized? <u>“This would be helpful. However, since at the time the EU enacted the directive of electronic commerce it was not able to harmonise these rules, I doubt that this will happen in future.”</u></p> <p>4.-9.: Company finds problems in all these areas and would welcome harmonisation work in them.</p> <p>12. Would it be useful for business to have an internationally harmonized regulatory framework for electronic contracting (similar to the Vienna Sales Convention)? <u>“I don’t think this would be useful. Similar to the Vienna Sales Convention the framework would not be ius cogens. The more powerful party of the contract would exclude those rules that he doesn’t want.”</u></p> <p>14. What are the most urgent issues that you would like governments and international organizations to address in electronic commerce in general, and electronic contracting in particular? <u>“A real problem is the question which law is applicable in cross-border business, e. g. competition law, data protection law, trade law. But I doubt that this problem can be solved in the near future.”</u></p>
7.	Iceland— bank consortium	<p>1. Does your company have experience with electronic contracting? Have you encountered any problems? <u>“The legal problems are lack of predictability and trust due to complex IT-law issues (contract formation, non-repudiation, archiving, validation, evidence) and the fact that there is no case law. The use of electronic communications for important transactions is mostly restricted to closed user groups, whose members agreed previously on the technology used and the appended legal consequences.”</u></p> <p>2. Do you think it is a problem that the extent to which you are bound by electronic messages differs in different countries? <u>“Yes, I think it is a general problem in international contract law. It is for example a big issue for both consumers and suppliers to know if something is an offer or an invitation to make an offer. There are valid reasons for both but the parties have to know which one applies.”</u></p> <p>3. Would it be helpful if the rules on formation of electronic contracts were to be harmonized? <u>“It would be helpful for clarification, but contract formation is a big legal issue for most countries and tradition is a very strong factor there. It is also not helpful to have special rules for electronic contract that vary from formation of contracts in the paper</u></p>



		<p>world. Another thing is that all formal requirements for contract formation can make simple things complex and should be avoided. <u>Intention should be the main issue.</u></p> <p>4. Do you think it is a problem that the law in relation to incorporation of terms differs in different countries? <u>“Yes, I think it is a problem, especially for consumers. In the Nordic countries for example, consumer protection is very strong and incorporation by reference has to be done in a very clear and informed way.”</u></p> <p>5. Would it be helpful if the rules on incorporation of terms in electronic contracts were to be harmonized? <u>“Yes, I think so, but again contract law is a delicate national issue.”</u></p> <p>6. Do you think it is a problem that the law in relation to mistake differs in different countries? <u>“Yes.”</u></p> <p>7. Would it be helpful if the rules on mistake in electronic communication were to be harmonized? <u>“I think that the traditional rules should be sufficient in almost all cases (intention, culpa, good faith).”</u></p> <p>8. Have you come across any problems due to international disharmony within the area of the law of evidence? <u>“It has to be very clear when a contract is concluded. The main issue has to be the intention to be bound by the contract and not some formal requirements.”</u></p> <p>9. Would it be helpful if the rules on evidence in relation to electronic transactions were to be harmonized? <u>“I do not think that it is practically doable to harmonize rules on evidence even though it would be helpful. It is also my opinion that general rules should apply here.”</u></p> <p>10. Do you believe that the issues A-D listed above are problems in practice? <u>“Yes, I believe that the issues that are listed constitute problems not only to electronic contracting but contracting in general. These issues are not new but the ability to conclude contracts electronically makes them more practical.”</u></p> <p>12. Would it be useful for business to have an internationally harmonized regulatory framework for electronic contracting (similar to the Vienna Sales Convention)? <u>“Yes it would be useful.”</u></p> <p>13. If such a harmonized regulatory framework is developed, should there be separate rules for electronic contracting or would it be preferable to have the same rules apply irrespective of what medium is used (i.e., for both online and offline contracting)? <u>“It is very preferable to have the same rules irrespective of the medium used.”</u></p>
8.	Japan—multinational	<p>1. Have you been required by suppliers/customers/partners to use electronic means for contracting? <u>“Yes.”</u> Have you encountered any problems (legal or practical)? <u>“Not so far. There have been few cases and little experience in electronic contracting.”</u></p> <p>2. Do you think it is a problem that the extent to which you are bound by electronic messages differs in different countries? <u>“That is definitely a big problem which could hamper electronic commerce eventually.”</u></p> <p>3. Would it be helpful if the rules on formation of electronic contracts were to be harmonized? <u>“Yes, it would, however it would be more important how harmonization was done.”</u></p>



		<p>4. Do you think it is a problem that the law in relation to incorporation of terms differs in different countries? <u>“It might be a problem. But this issue would occur also in the case of non-electronic contracts. In case of non-electronic contracts, the parties normally take steps in the contract process to prevent it from happening.”</u></p> <p>5. Would it be helpful if the rules on incorporation of terms in electronic contracts were to be harmonized? <u>“It is hard to say Yes or No.”</u></p> <p>6. Do you think it is a problem that the law in relation to mistake differs in different countries? <u>“Yes, it is a big problem.”</u></p> <p>7. Would it be helpful if the rules on mistake in electronic communication were to be harmonized? <u>“It is hard to say Yes or No. If there is an article to prevent this risk from happening in the contract, there would not be such a need for international harmonization in this area. This is supposed to be an issue which should be dealt with between the parties to the contract.”</u></p> <p>8. Have you come across any problems due to international disharmony within the area of law of evidence regarding proving that a contract is concluded, or the terms upon which you have contracted? <u>“No.”</u></p> <p>9. Would it be helpful if the rules on evidence in relation to electronic transactions were to be harmonized? <u>“I do not know”</u>.</p> <p>10. Do you believe that the issues A-D listed above are problems in practice? <u>“For some issues, Yes, but not for all the issues.”</u></p> <p>11. Are there other issues that UNCITRAL should be addressing? <u>“No.”</u></p> <p>12. Would it be useful for business to have an internationally harmonized regulatory framework for electronic contracting (similar to the Vienna Sales Convention)? <u>“As a guideline or framework, Yes. But if the convention was adopted, it would be totally up to each individual nation whether or not to ratify it. So, considerations of sovereignty would be important.”</u></p> <p>13. If such a harmonized regulatory framework is developed, should there be separate rules for electronic contracting or would it be preferable to have the same rules apply irrespective of what medium is used (i.e., for both online and offline contracting)? <u>“It is hard to say which is better. We need to research more practical cases before making a decision on this issue.”</u></p> <p>14. What are the most urgent issues that you would like governments and international organizations to address in electronic commerce in general, and electronic contracting in particular? <u>“Certificate authority liability and institutional and harmonized document formats to prevent problems entailed by electronic signatures.”</u></p>
9.	Sweden— multinational	<p>1. Does your company have any experience with electronic contracting? <u>“Yes. The reason for not using e-contracting apart from EDI is not legal uncertainty. It’s rather that no e-sales contracts are ever entered into, since all commerce is done via a password-protected e-commerce platform where you have a paper contract to start with. All international contracts are entered into locally by affiliates, which means no problems with disharmony of law. Cross-border contracts are so large that they are handled face-to-face.”</u></p> <p>7. Would it be helpful if the rules on mistake in electronic communication were</p>



		to be harmonized? <u>“The issue of mistake is a problem. Needs to be solved on national level as well as globally.”</u>
10.	Thailand—commercial company	<p>1. Does your company have experience with electronic contracting? <u>“No, we have no experience to use electronic contracting due to legal uncertainty and have no opportunity to use it yet.”</u></p> <p>2.-9.: Company finds problems in all these areas and would welcome harmonisation work in them.</p> <p>12.: Would it be useful for business to have an internationally harmonized regulatory framework for electronic contracting (similar to the Vienna Sales Convention)? <u>“Yes, it will be very helpful.”</u></p> <p>13.: If such a harmonized regulatory framework is developed, should there be separate rules for electronic contracting or would it be preferable to have the same rules apply irrespective of what medium is used (i.e., for both online and offline contracting)? <u>“We see that there are some requirements that the rules for on-line electronic contracting and the rules off-line electronic contracting are separated.”</u></p>
11.	United States—large bank	<p>1. Have you encountered any problems (legal or practical)? <u>“No, too early in the game for potential issues to emerge.”</u></p> <p>2.-3.: Company finds problems in all these areas and would welcome harmonisation work in them.</p> <p>4. Do you think it is a problem that the law in relation to incorporation of terms differs in different countries? <u>“Yes, big problem. Primarily on the context in which an electronic signature is used with the contract (the essence of the electronic contract value proposition is tied to electronic signatures). Example: does an electronic signature signify acknowledgement, informal general agreement or absolute legal confirmation of content? A global means for setting the context within language and cultural permutations is needed.”</u></p> <p>5.-9.: Company finds problems in all these areas and would welcome harmonisation work in them.</p> <p>10.: Do you believe that the issues A-D listed above are problems in practice? <u>“Not at the moment, but they are problems in getting traction for electronic contract/signatures generally. Practice will not commence until some of the foundation issues are resolved.”</u></p> <p>12.: Would it be useful for business to have an internationally harmonized regulatory framework for electronic contracting (similar to the Vienna Sales Convention)? <u>“Yes.”</u></p> <p>13. If such a harmonized regulatory framework is developed, should there be separate rules for electronic contracting or would it be preferable to have the same rules apply irrespective of what medium is used (i.e., for both online and offline contracting)? <u>“Actually, resolving issues arising in the course of online contracting will likely also benefit latent issues in the off line world. I suggest working towards good online rules and then checking them for how well they will work with existing offline practice.”</u></p> <p>14. What are the most urgent issues that you would like governments and international organizations o address in electronic commerce in general, and electronic contracting in particular? <u>“1.) Certificate authority liability. 2.) Structured document formats and syntax to resolve context confusion in applying electronic signatures.”</u></p>



12.	United States— multinational	<p>General comments: <u>“We welcome both the UNCITRAL initiative considering the development of legal rules for electronic contracting, and the ICC initiative to make sure that such an important project reflects business realities and practices. Before answering the questionnaire, we highlight a few key issues that are worth considering:</u> <u>--The divergence of national rules on electronic contracting may call for harmonisation. We would recommend, however, that attention is also given to the mutual recognition of national rules in those areas where the divergences are not significant. In choosing the appropriate method of harmonisation, it would further be useful to reflect upon the usefulness of codes of conduct.</u> <u>--To the extent that new or modified rules are needed to address the unique aspects of electronic transactions, such rules should be international because of the inherently global nature of electronic commerce. International and regional (i.e. <i>Communication from the Commission to the Council and the European Parliament on European Contract Law, 2001/C 255/01</i>) efforts of promoting increased certainty should be undertaken jointly, otherwise they could leave questions unanswered to entities doing business both within and outside a specific region.</u> <u>--In any transaction, whether between two businesses, between a business and a consumer, or between a business and a public entity, the validity of forming contractual relationships electronically must be legally ensured. In an increasingly global marketplace, all parties to an electronic transaction must feel assured that the legal framework which governs traditional commercial transactions is also applicable to contractual obligations acquired using electronic means.</u> <u>--Many jurisdictions have not yet adequately addressed questions such as how to contract via an on-line network, what constitutes a signature in the on-line environment, and whether and to what extent on-line contracts are enforceable. This situation creates uncertainty and raises the spectre of non compliance and breach of obligations.”</u></p> <p>1. Have you been required by suppliers/customers/partners to use electronic means for contracting? <u>“Yes, mainly by customers.”</u> Have you encountered any problems (legal or practical)? <u>“From a general perspective, there is an overall sense of legal uncertainty. More specifically, the most common problems are related to multiple jurisdictions (including access from sanctioned countries); personal data protection (effectiveness of online consent, opt-in, etc.); and effectiveness of click/shrink wrap method in connection with certain country specific provisions (i.e. express acceptance of clauses in standard contracts under art. 1341 of the Italian Civil Code).”</u></p> <p>2. Do you think it is a problem that the extent to which you are bound by electronic messages differs in different countries? <u>“Yes.”</u></p> <p>3. Would it be helpful if the rules on formation of electronic contracts were to be harmonized? <u>“Definitely yes.”</u></p> <p>4. Do you think it is a problem that the law in relation to incorporation of terms differs in different countries? <u>“Yes.”</u></p> <p>5. Would it be helpful if the rules on incorporation of terms in electronic</p>
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	<p>contracts were to be harmonized? <u>“Yes, very helpful.”</u></p> <p>6. Do you think it is a problem that the law in relation to mistake differs in different countries? <u>“We believe that there may be a need to investigate to what extent the “type” of mistake is different in an on-line compared to the off-line environment and, if so, whether any technical or regulatory initiatives are needed in this regard.”</u></p> <p>7. Would it be helpful if the rules on mistake in electronic communication were to be harmonized? <u>“Yes.”</u></p> <p>8. Have you come across any problems due to international disharmony within the area of law of evidence regarding proving a) that a contract is concluded, or b) the terms upon which you have contracted? <u>“Yes, mainly b).”</u></p> <p>9. Would it be helpful if the rules on evidence in relation to electronic transactions were to be harmonized? <u>“Definitely yes.”</u></p> <p>10. Do you believe that the issues A-D listed above are problems in practice? <u>“Yes.”</u></p> <p>12. Would it be useful for business to have an internationally harmonized regulatory framework for electronic contracting (similar to the Vienna Sales Convention)? <u>“Yes, although due consideration should be given to the fact that the application of the Vienna Convention is almost always excluded from contracts.”</u></p> <p>13. If such a harmonized regulatory framework is developed, should there be separate rules for electronic contracting or would it be preferable to have the same rules apply irrespective of what medium is used (i.e., for both online and offline contracting)? <u>“Electronic contracts are not fundamentally different from paper based contracts. Nevertheless e-commerce does not fully reproduce the contracting patterns used on contract formation through traditional means. Therefore, even though a harmonisation effort to eliminate legal obstacles to the use of modern means of communication might not be primarily concerned with substantive law issues, some adaptation of traditional contract law rules could be needed to accommodate the needs of electronic commerce. To that extent, we believe that rules addressing the specificity of the medium should be elaborated. Not to mention the fact that consensus is more likely to be reached on electronic practices due to their novelty and to the lack of a consolidated legal tradition in such an area.”</u></p> <p>14. What are the most urgent issues that you would like governments and international organizations to address in electronic commerce in general, and electronic contracting in particular? <u>“In general: a) it should be clear what types of contract are to be governed; we believe that dealing solely in the area of international sales of tangible goods would be too limited, hence consideration should be given to any contract concluded or evidenced by electronic means. b) Specifically concerning electronic contracting: contract formation (i.e. offer and acceptance, expression of consent, receipt and dispatch, storage and retrieval of contract terms, automated computer systems, treatment of mistake); evidence; applicable law; - dispute resolution/jurisdiction (also in B2B transactions).”</u></p>
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