



Roksana Janina Malek, LL.M.

# ELECTRONIC COMMERCE IN INTERNATIONAL TRADE LAW

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of Electronic Communications in International  
Contracts 2005 and the CISG

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## CHAPTER 1: GENERAL INTRODUCTION

With the increasing use and reliance on electronic means in international trade, the field of electronic commerce is getting increasingly important and nobody can deny that the use of electronic means is playing a key role in an efficient worldwide growing field of international commerce. According to a study of the Organisation for Economic Cooperation and Development<sup>1</sup> approximately 7.5 per cent of all contracts will be concluded via the internet by the year 2007. The rapid development of new technologies, such as electronic mail, electronic data exchange and the internet makes it difficult to keep pace. Through this progression the number of international contracts will also increase. This poses a challenge to lawyers as well as legislators around the world, as the field of electronic commerce in international trade law has so far not been in the focus of the general public.

For a long time, the UN Convention on Contracts for the International Sale of Goods 1980 (CISG)<sup>2</sup> was the most important international legal instrument to deal with international sales of goods. In 1980, during the drafting of the CISG, electronic means of communication were in their infant stages and not yet highly developed, so questions and problems concerning electronic commerce beyond telegram and telefax were not considered<sup>3</sup>.

In the late 1980s the global organisation, the United Nation Commission on International Trade Law (UNCITRAL) was chosen to develop uniform private law standards for electronic commerce. The work resulted in the UNCITRAL Model Law on Electronic Commerce 1996.<sup>4</sup> Five years later in 2001 the UNCITRAL issued the UNCITRAL Model Law on Electronic Signatures<sup>5</sup>.

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<sup>1</sup> See: [www.oecd.org](http://www.oecd.org).

<sup>2</sup> The text of the CISG can be found on: <http://www.uncitral.org/pdf/english/texts/sales/cisg/CISG.pdf>.

<sup>3</sup> <http://premium.vlex.com/doctrina/Revista-Contratacion-Electronica/Electronic-Communicationsunder-CISG/2100-194739,01.html> For a summary of UNCITRAL legislative history of the CISG see e.g.: <http://www.cisg.law.pace.edu/cisg/linkd.html>.

<sup>4</sup> The final text and a guide to enactment of the Model Law on Electronic Commerce can be found on: [http://www.uncitral.org/pdf/english/texts/electcom/05-89450\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf).

<sup>5</sup> The final text and a guide to enactment of the Model Law on Electronic Signatures can be found on: <http://www.uncitral.org/pdf/english/texts/electcom/ml-elecsig-e.pdf>.



Both Model Laws were very successful and have been adopted all around the world.<sup>6</sup> Despite the fact, that they both represent a widely accepted basis for international legal harmonisation in the field of electronic commerce, calls for a binding Convention began even before UNCITRAL issued the UNCITRAL Model Law on Electronic Signatures 2001, as it was argued, that only a binding instrument could effectively remove obstacles to electronic commerce that might derive, for example, from form requirements contained in other international Conventions.<sup>7</sup>

In 2002 the UNCITRAL Working Group on Electronic Commerce (hereinafter: 'Working Group') started working on a new binding Convention concerning the electronic commerce in international contracts. After long and hard work the new Convention was finalized in October 2004 and approved in July 2005. The new Convention has been named UN Convention on the Use of Electronic Communication in International Contracts<sup>8</sup> (hereinafter: 'Electronic Contracting Convention' or 'Convention on Electronic Contracting' or 'Convention') and reflects the newest development in the sector of electronic commerce.

In this dissertation I will deal with electronic commerce in international law. Therefore I will present the Electronic Contracting Convention and analyze its scope of application, its key provisions as well as its importance to international trade.

In the second part I will analyze all relevant questions of electronic commerce under the CISG, as it is, despite the new UN Electronic Contracting Convention, the best known and most adopted Convention when it comes to international trade.<sup>9</sup> Furthermore I will compare the problematic issues of electronic commerce under both Conventions and present their ad-

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<sup>6</sup> A list with states that have enacted the UNCITRAL Model Law on Electronic Commerce 1996 can be found on [www.uncitral.org/uncitral/en/uncitral\\_texts/electronic\\_commerce/1996Model.html](http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model.html) a list of states that enacted the UNCITRAL Model Law on Electronic Signatures 2001 on [www.uncitral.org/uncitral/en/uncitral\\_texts/electronic\\_commerce/2001Model\\_signatures.html](http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2001Model_signatures.html).

<sup>7</sup> Faria, 'An introductory note', p. 689.

<sup>8</sup> The final text can be found on:

[http://www.uncitral.org/uncitral/en/uncitral\\_texts/electronic\\_commerce/2005Convention.html](http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention.html).

<sup>9</sup> To see the present status of ratification of the CISG and a list of all states that have adopted the CISG see: [http://www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html).

vantages and disadvantages in the sector of electronic commerce. Additionally I will show the importance and impact of both legal instruments on electronic commerce in international trade.

## **CHAPTER 2: THE UN CONVENTION ON THE USE OF ELECTRONIC COMMUNICATIONS IN INTERNATIONAL CONTRACTS 2005**

### **I. Introduction**

#### **1.) Historical development of the Electronic Contracting Convention**

Until 1996 the most important legal instrument for any international sales of goods was the CISG. Although it was and still is a great success, it was drafted before electronic communication was developed and neither its language nor its concept seems to fit for the new achievements in digital communication. It was obvious that, despite interpretation and development of the CISG by jurisprudence, it would not apply to all aspects of electronic contracting. Furthermore by developing different interpretations of the provisions in different countries around the world, the lack of legal certainty and predictability in electronic commerce would grow and cause even more confusion. The only solution was to create a legal instrument dealing exclusively with electronic commerce.

The first step was the elaboration of the UNCITRAL Model Law of Electronic Commerce<sup>10</sup> which started in the early 1990s and was completed in 1996. The Model Law on Electronic Commerce developed a coherent set of legal responses to the principal questions posed by electronic commerce, with the goal to remove barriers that traditional legal rules tended to pose to the new practices.<sup>11</sup> Its prime principle was the non-discrimination of electronic communication. Article 5 of the Model Law for example stated that electronic communication may not

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<sup>10</sup> The text can be found on:  
[http://www.uncitral.org/uncitral/en/uncitral\\_texts/electronic\\_commerce/1996Model.html](http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model.html).

<sup>11</sup> Gregory, 'The proposed Convention', p. 313.

be denied legal effect solely because it is done by an electronic medium and article 6 set out that the legal requirement of writing may be satisfied if the electronic record is accessible to be used for subsequent reference.

Following the Model Law on Electronic Commerce, the Working Group started generating a Model Law on Electronic Signatures.<sup>12</sup> This Model Law dealt mainly with the question of reliability of electronic signatures. This issue had not yet been discussed in the Model Law on Electronic Commerce, so it was necessary to pursue the question of electronic signatures. The work was finalized in 2001 and the Model Law on Electronic Signatures was ready to be adopted.

As mentioned above, both Model Laws were widely adopted and were a great success in the field of electronic commerce. Nevertheless it was said, that the problem of legal uncertainty and non-harmonisation had not yet been solved. The problem was that the Model Laws were not binding and the states had flexibility in choosing provisions to implement them in their domestic laws. So countries which have adopted the Model Laws have done so inconsistently and each country has implemented the Model Law differently. This resulted in a significant variation of electronic commerce legislation.

The EU, for example, promulgated the Directive 2000/31/EC on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market<sup>13</sup> ('EU Directive on Electronic Commerce'), which differed significantly in scope and content from the Model Law on Electronic Commerce.<sup>14</sup> Another problem was that several states had already adopted their own national laws on electronic commerce when the Model Laws were elaborated.<sup>15</sup>

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<sup>12</sup> The final text can be found on:

[http://www.uncitral.org/uncitral/en/uncitral\\_texts/electronic\\_commerce/2001Model\\_signatures.html](http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2001Model_signatures.html).

<sup>13</sup> The text (German language) can be found on: [http://europa.eu.int/eur-lex/pri/de/oj/dat/2000/l\\_178/l\\_17820000717de00010016.pdf](http://europa.eu.int/eur-lex/pri/de/oj/dat/2000/l_178/l_17820000717de00010016.pdf). English language: <http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:32000L0031:EN:HTML>.

<sup>14</sup> Chong/Chao, 'UN Convention', p. 117.

<sup>15</sup> At the time the UNCITRAL Model Law on Electronic Signatures ratified by the UN in July 2001 the US State Utah (1995), Russia (1995), Germany (1997), Italy (1997), Malaysia (1997), Australia (1999), UK (2000)

It was said, that only the elaboration of a binding Convention on electronic commerce could overcome the lack of uniformity and harmonisation as well as fill the gaps in the present legislation. Only a binding Convention would be adopted without alterations and changes (except for changes which are expressly allowed under the Convention) and would be binding law for signatory states (see: article 26 of the Vienna Convention on the Law of Treaties 1969).<sup>16</sup>

Nevertheless there were also arguments voiced against a new Convention. One of them was that if countries want to promote or just remove legal barriers in electronic commerce they could do so by adopting the Model Laws. If the Convention says the same thing, it would be superfluous, but if it says something different than the Model Laws it would be confusing.<sup>17</sup> It was also argued that there is a sufficient number of legal instruments on electronic commerce and a new one would not harmonise the legal system, but cause even more confusion.

Different approaches were discussed how to solve the existing problem of legal uncertainty and diversity. Some have proposed a modification of the CISG and its adjustment to electronic commerce as a solution, but soon this option was rejected, as more confusion would be caused, in case some countries would adopt the modernised CISG while other countries would still have the 'old' CISG. Furthermore there was the risk, that an extensive modification would be required, which would produce more costs and delays than the creation of a new legal instrument.<sup>18</sup>

The International Chamber of Commerce (ICC) proposed the development of a new Model Law<sup>19</sup>, where new topics could be subject of opt-in private systems of rules, comparable to the various existing ICC rules. Although the system of ICC rules is widely recognized, it was argued, that a new Model Law as proposed by the ICC was not the appropriate legal instrument, since it would not remove the lack of non-conformity, as once again there would be a variety of

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and New Zealand (2000) have already elaborated their own national law on electronic signatures.

<sup>16</sup> Article 26 of the Vienna Convention on the Law of Treaties 1969 embodies the principle of 'pacta sunt servanda' by saying that every treaty in force is binding upon the parties and must be performed by them in good faith.

<sup>17</sup> Gregory, 'The proposed Convention', p. 317.

<sup>18</sup> Gregory, 'The proposed Convention', p. 317.

<sup>19</sup> Legal Aspects, A/CN.9/WG.IV/WP. 101. See also Legal Aspects, A/CN.9/WG.IV/WP. 105.

different legal standards. Additionally it was unclear, if the adoption of the new rules would require a prior contract between the parties or even a statutory base.<sup>20</sup>

Despite these various opposing arguments and different proposals for an approach, a new Convention was still seen as the best solution.

In 2001 the Working Group was tasked with the elaboration of a new Convention on Electronic Contracting in International Trade. The work started in March at the 39<sup>th</sup> Session of the Working Group<sup>21</sup> and was finalized at the 44<sup>th</sup> session in October 2004.<sup>22</sup> It is quite clear, that the drafters were heavily influenced by the CISG (especially in the first chapter of the Electronic Contracting Convention) and by the Model Laws (which can be seen especially in the third chapter of the Convention).<sup>23</sup>

After the Convention was adopted by the UN General assembly on the 23 November 2005, it is open for signature at the UN Headquarters in New York from the 16 January 2006 to the 16 January 2008. It is subject to ratification, acceptance or approval by the signatory states and is open for accession by non-signatory states.

## **2.) The goal of the Convention**

The Electronic Contracting Convention can be adopted by all states - contrary to the flexible approach used in the Model Laws- as a uniform and binding set of rules.<sup>24</sup> Even if a state does not ratify the Convention, it will still influence the terms of the transaction, particularly where the other contracting party is from a state that is a signatory to the Convention.<sup>25</sup> The goal of the Convention is stated clearly in the preamble. The problems created by uncertainties as to the legal value of electronic communication exchanged in the context of international contracts constitute an obstacle to international trade. Considering this, the Convention seeks to

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<sup>20</sup> Gregory, 'The proposed Convention', p. 318.

<sup>21</sup> Report, A/CN. 9/509.

<sup>22</sup> Report, A/CN. 9/571.

<sup>23</sup> All similarities and differences of the Convention and the CISG as well as of the both Model Laws will be discussed in detail in the relevant articles.

<sup>24</sup> There are a few possibilities for the states to modify the Convention when they adopt it. I will discuss this issue later. Nevertheless the uniformity is not destroyed by the modification. See: Chapter 2, II, 2.) 3.).

<sup>25</sup> Connolly/Ravindra, 'UN Convention on E-Commerce', p. 31.

remove obstacles to the use of electronic communication in international contracts, including obstacles that might result from the operation of existing international trade law instruments. The Convention shall also enhance legal certainty and make international contracts commercially and legally more predictable. Additionally it seeks to promote the development of trade and to improve the efficiency of commercial activities and to help states gain access to modern trade routes and previously remote parties and markets. It also offers practical solutions for issues related to the use of electronic means of communication in connection with international contracts. Furthermore the Convention may be used as an interpretation guideline for other legal instruments in international trade and electronic commerce. However, the Convention is not intended to establish uniform rules for substantive contractual issues that are not specifically related to the use of electronic communications.<sup>26</sup>

### **3.) Core principles**

The Convention contains provisions embodying two principles at the core of any electronic communication law: It provides functional equivalence of electronic communications, while preserving the principle of technological neutrality.

Functional equivalence means that the law treats paper documents and electronic transactions equally. This is especially important, as this principle can have impact on the interpretation of other legal instruments which contain provisions on form, writing or signature requirements. Technological neutrality means that the law does not discriminate between different forms of technology.<sup>27</sup>

As a further principle the party autonomy is embodied in the Electronic Contracting Convention. This principle is a core issue in international trade, since it has been already established in the CISG, especially in article 6 CISG and, to a lesser extent, in both Model Laws.

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<sup>26</sup> Explanatory note, para. 4.

<sup>27</sup> Connolly/Ravindra, 'UN Convention on E-Commerce', p. 32.

#### **4.) Status of ratification**

The Electronic Contracting Convention has been opened for signature on the 16 January 2006. Pursuant to article 23, 'the Convention enters into force on the first day of the month following the expiration of six months after the date of deposit of the third instrument of ratification, acceptance, approval or accession'.

The first states to sign the Convention were the Central African Republic and Senegal, Lebanon, China, Singapore, Madagascar, Sri Lanka and Sierra Leone followed. By now seven states have signed the Convention.<sup>28</sup>

## **II. Scope of application of the Electronic Contracting Convention**

### **1.) Positive determination of the scope of application**

The scope of application is positively determined in article 1 of the Convention. Article 1(1) regulates that the Convention applies to the use of electronic communications in connection with the formation or performance of a contract between parties<sup>29</sup> whose places of business are in different states.

#### **a.) Electronic communication in connection with formation and performance of a contract**

The term of 'electronic communication' is defined in article 4 (b) and (c) as 'any communication whereby the parties generate, send, receive or store information by electronic, magnetic opti-

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<sup>28</sup> The present status of ratification can be found on:

[http://www.uncitral.org/uncitral/en/uncitral\\_texts/electronic\\_commerce/2005Convention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention_status.html)

Last access to the website, 01.02.2007.

<sup>29</sup> The notion 'parties' includes both natural persons and legal entities. Moreover the application of the Electronic Communications Convention does not depend on whether the parties are considered 'civil' or 'commercial'. Therefore, for the purpose of determining the scope of the Electronic Contracting Convention, it does not matter whether a party is a merchant or not in a particular legal system that applies special rules to commercial contracts different from the general rules of contract law. Also the parties' nationality is irrelevant. 'Explanatory note', para. 68, 69.

cal or similar means'. This definition is very broad and leaves space for new technological developments. Beyond that, contracts that are partially made by electronic communications and partially by traditional means such as oral or written communication are also covered.<sup>30</sup> Furthermore the definition also includes arbitration agreements and other legally binding agreements whether or not they are usually called 'contracts'.<sup>31</sup>

The definition of 'in connection with formation and performance' in terms of article 1 (1) is not only limited to the conclusion of a contract but also covers any contract negotiation and is applied even to communications that are done at a time when no contract - and possibly not even negotiation of a contract - has yet come into being.<sup>32</sup>

It is clearly visible from the working papers<sup>33</sup> that the drafters intended such a broad interpretation, as they considered to include the word 'negotiations' in the text, but finally felt, that the word 'formation' is broad enough to cover all stages of contracting. Consequently the Convention applies also to communications that do not result in a conclusion of a contract.

Although the provision is based on the Model Law on Electronic Commerce<sup>34</sup>, the wording differs, since the Model Law refers to 'data messages' only. The new term 'electronic communication' establishes a link between the purposes for which electronic communication might be used and the notion of 'data messages' which was important to retain, since it encompassed a wide range of techniques beyond purely 'electronic' techniques.<sup>35</sup>

#### **b.) International contracts**

Another condition of applicability is the 'internationality' of the communication. For the purposes of the Convention, a communication is international, if the parties have their places of

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<sup>30</sup> Connolly/Ravindra, 'UN Convention on E-Commerce', p. 33.

<sup>31</sup> 'Explanatory note', para. 5, 57. Neither the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) nor most domestic laws do use the word 'contract' to refer to arbitration agreements.

<sup>32</sup> 'Explanatory note', para. 55.

<sup>33</sup> Report, A/CN.9/571, para. 15.

<sup>34</sup> The text of article 1 of the Model Law on Electronic Commerce: Sphere of application. This Law applies to any kind of information in the form of a data message used in the context of commercial activities.

<sup>35</sup> Chong/Chao, 'UN Convention', p. 136.



business in different States. However, the Convention does not require both States to be contracting States of the Convention, as long as the law of a contracting State applies to the dealings of the parties.<sup>36</sup>

It was not clear from the beginning on, whether the Convention shall apply to all or to international contracts only. The drafters discussed the possibility of the applicability to all electronic contracts, both international and domestic,<sup>37</sup> but rejected it in favour of restricting the text to international transactions, with the argument that the goal was the development of an electronic parallel to the CISG.<sup>38</sup> Pursuant to its article 1 (1), the CISG also applies to international contracts only.

### c.) Place of business

#### aa.) Determination of the place of business

The definition of the place of business can be found in article 4 (h) of the Convention. Furthermore article 6 sets out a number of rebuttable presumptions and default rules to determine the parties' location or the place of business. This is new, as there was no adequate definition in the Model Law on Electronic Commerce.

The determination of the place of business or the location of the parties is crucial and plays an important role, as it not only decides whether the Convention is applicable, but is also important to determine the place of where electronic communication is dispatched, the place of contract formation as well as for issues such as jurisdiction, applicable law and enforcement.<sup>39</sup>

The determination of a location in electronic commerce can be very difficult and challenging,

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<sup>36</sup> Report, A/CN.9/571, para. 19.

<sup>37</sup> Report, A/CN.9/528, paras. 29-31.

<sup>38</sup> Gregory, 'The proposed Convention', p. 318.

<sup>39</sup> Explanatory note, para. 109.