

LETTER OF SUBMITTAL

Dear,

Herewith, submitted for your consideration and for submission to the Senate for its advice and consent to ratification is the United Nations Convention on the Use of Electronic Communications in International Contracts (the "Convention"). The Convention was adopted by the United Nations General Assembly in 2005; it has since been signed by [eighteen] countries. The United Nations Commission on International Trade Law produced the Convention after three years of work. United States American experts in the law of electronic commerce were involved in the drafting process at every stage.

The Convention is derived principally from the United Nations Model Law on Electronic Commerce (the "Model Law"). Applicable United States law, embodied in the Uniform Electronic Transactions Act ("UETA") promulgated by the Uniform Law Conference (also known as the National Conference of Commissioners on Uniform State Laws) (the ULC) in 1999 and adopted by 476 states to date, as well as the federal Electronic Signatures in Global and National Commerce Act of 2000 ("E-Sign") (the UETA and E-Sign are together referred to herein as "Domestic Legislation"), are also based predominantly on the Model Law. As a consequence of this common legal source, existing United States law is substantially consistent with the provisions of the Convention.

The main virtue of the Convention from an United States American point of view is that it will make the employment of electronic media in international commerce more reliable for transactions that are governed by the law of other countries. In addition, the flexibility of the Convention, like that of Domestic Legislation, will accommodate future development in the law of electronic commerce better than other more highly regulated legal regimes. By and large, United States American industry has arranged its commercial transactions in a way that complies with the provisions of E-Sign and UETA. With trading partners located in Europe and more developed areas of Asia, business parties are governed by legal regimes that have laws effectuating the use of electronic media in commerce. However, there remain countries in the developing world that lack a legal infrastructure to validate electronic commerce. For these countries, as well as the broader arena of global commerce, the Convention will provide consistent, uniform legal rules and a legal framework to assure that transactions conducted electronically in international transactions will have the same efficacy regardless of the location of the parties.

It is important to remember that the Convention will have no application in cases that are not within its limited scope which governs only business contracts between parties located in different countries. Domestic Legislation governs the use of electronic records and signatures in all transactions, of which contracts is but a subset. Finally, since the Convention closely parallels United States American law in substance, American parties in the United States will be comfortable with the Convention and will welcome it as the law where, for some reason, there is no similar applicable law to effectuate their electronic transactions.

The following organizations support the ratification of the Convention: the Uniform Law Commission, the American Bar Association, [insert others]. No opposition to ratification of the Convention has been expressed.

SUMMARY OF THE CONVENTION

The Convention will apply to the use of electronic communications in connection with the negotiation, formation, or performance of any contract entered into between parties whose businesses are in different countries. Article 2 does exclude transactions undertaken in certain regulated environments where sophisticated parties have implemented systems rules to address the issues of electronic commerce, and also excludes negotiable instruments and documents of title. Of greatest significance is the exclusion of “contracts concluded for personal, family, or household purposes.” Consequently, the scope of the Convention is limited to international, business to business, and business to government, contracts.

Article 3 states the principle of party autonomy, or freedom to alter, or contract out of, any of the provisions in the Convention. Party autonomy under the Convention will be preserved through ratification of the Convention as a self-executing treaty[, or through enactment of appropriate implementing legislation].

Articles 4 and 5 set forth definitions and interpretive rules for the application of the Convention. As can be seen in the attached Appendix A, the definitions in the Convention, though using different words, are wholly consistent with terminology in Domestic Legislation. Further the tenets of interpretation articulated in Article 5 are also consistent with the broad interpretive constructions to be applied to both E-Sign and the UETA.

Article 6 sets forth rules for determining the location of parties to a contract. This is particularly important for parties seeking to determine the applicability of the Convention to a particular contract.

Articles 8 and 9 contain the core of the Convention validating the use of electronic communications and electronic signatures in international contracts, in lieu of pen and ink requirements. These provisions are consonant with the rules found in Domestic Legislation effectuating the use of electronic records and electronic signatures.

Article 10 sets forth rules for determining when an electronic communication is sent or received. These rules are consistent with the sending and receipt rules found in the UETA. E-Sign does not contain any similar rules governing the timing of sending and receipt.

Article 11 sets forth a substantive rule regarding the effect of wide scale communication as an offer to enter into a contract. The rule articulated in Article 11 is substantively consistent with the law of contracts found in all 50 states (Restatement of Contracts 3d, Section 26, Comment b). In any event, this rule under the Convention will be preserved through ratification of the Convention as a self-executing treaty[, or through enactment of appropriate implementing legislation].

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Article 12 clarifies the efficacy of contracts formed through the use of interactive communication devices. This is consistent with provisions in Domestic Legislation.

Article 14 provides rules for resolution of limited computer errors involving individuals when interacting with automated communication systems. The provisions of Article 14 are consistent with the UETA but have no counterpart in E-Sign.

AMERICAN DECLARATION

The Committee on the Implementation of the UN E-Commerce Convention formed by the ULC (the "ULC Committee") recommends the following declarations be included in the United States instrument of ratification¹:

Article 19(1) Declaration

The ULC specifically recommends that the United States of America not make a declaration under Article 19(1) of the Convention.

NOTE – A declaration under Article 19(1) would unnecessarily restrict the scope of application of the Convention. Though the UETA requires parties to agree to conduct transactions electronically, and a declaration under Article 19(1)(b) would seem to be consistent with that provision, such a declaration is unnecessary. The provisions on Party autonomy in Article 3, and the ability to derogate from the provisions of the Convention by implication (See Convention Explanatory Notes 86 and 89), are sufficient to assure that the parties will manifest some agreement to conduct their contracts electronically without requiring this sort of agreement.

Article 19(2) Declaration on the Scope of Application.

The United States, in accordance with Article 21 of the Convention, makes the following declaration:

The Convention shall apply to electronic communications related to, or used in a contract or other record to the extent it is governed by Sections 1-107 (Revised section 1-306) and 1-206 (deleted from Revised Article 1), Article 2 or Article 2A of the Uniform Commercial Code, as in effect in any jurisdiction in the United States of America

¹ The United States Department of State may seek further declarations limiting the applicability of the Convention to certain treaties not excluded in Article 20(1) of the Convention.

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FOREIGN RELATIONS COMMITTEE

EXHIBIT A

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The Convention shall not apply to electronic communications related to, or used in:

[The following are the exceptions found in E-Sign Section 7003, and also incorporated into numerous State adoptions of the UETA as part of Section 3]

1. A contract or other record to the extent it is governed by
 - a. A law governing the creation and execution of wills, codicils, or testamentary trusts;
 - b. A law governing adoption, divorce, or other matters relating to family law; or
 - c. The Uniform Commercial Code, as in effect in any jurisdiction in the United States, other than Sections 1-107 (Revised section 1-306) and 1-206 (deleted from Revised Article 1) and Articles 2 and 2A.
2. Court orders or notices, or official, court documents (including briefs, pleadings and other writings) required to be executed in connection with court proceedings;
3. Any notice of
 - a. The cancellation or termination of utility services (including water, heat, and power);
 - b. Default, acceleration, repossession, foreclosure, or eviction, or the right to cure, under a credit agreement secured by, or rental agreement for, a primary residence of an individual;
 - c. The cancellation or termination of health insurance or benefits or life insurance benefits (excluding annuities);
- d. Recall of a product, or material failure of a product, that risks endangering health or safety.
4. Any document required to accompany any transportation or handling of hazardous materials, pesticides, or other toxic or dangerous materials.

4. NOTE – It has been suggested that the opening affirmative statement of coverage relating to UCC Articles 2 and 2A be included as an aid to more clearly understanding that the Convention will apply to sales and leases of goods. The balance of the exclusion is retained to track the E-Sign exclusions.

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AMERICAN UNDERSTANDINGS

With the exception of the above declaration under Article 19(2) of the Convention limiting the transactional scope of the Convention, the Convention does not deviate from Domestic Legislation sufficiently to justify the United States adopting additional Declarations ~~to state its disagreement with or divergence from the terms of the Convention.~~

However, the ULC Committee has identified areas where the United States should adopt Understandings concerning the meaning of terms in the Convention.

These Understandings relate to the manner in which party autonomy under Article 3 may be recognized; the manner in which the Convention and domestic law will be construed when a

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non-consumer contract otherwise subject to the Convention is involved; the determination of the time and place of dispatch of an electronic communication; and implementation of Article 11 as a matter of domestic law.

The Committee recommends the following four understandings be included in the United States instrument of ratification:

Article 3. Party Autonomy

The United States understands as follows: Parties to a contract to which the Convention applies may exclude the application of the Convention or derogate or vary the effect of any of its terms expressly by the words used or by implication [from their actions or surrounding circumstances]. (See Convention Explanatory Notes 88 and 89)

NOTE – Members of the Cyberspace Committee suggested that the bracketed language may go too far in permitting exclusion from surrounding circumstances. Should the clause be deleted?

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Article 5. Interpretation

~~The United States understands as follows: In construing Domestic Legislation[, including the Implementing Legislation,] as the same may apply to a contract within the Scope of the Convention, regard is to be had as to the international character of the transaction to which such legislation is being applied and in a manner that will promote uniformity in the application of the terms and underlying principles of the Convention in international trade.~~

NOTE – Is this understanding needed here? Could it simply be included as part of the submission letter to the Senate?

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Article 10. Time and place of dispatch and receipt of electronic communications

The United States understands as follows: In determining the time and place of dispatch under Article 10(1), an electronic communication will only be dispatched if the communication is properly directed or addressed to an addressee/recipient.

Article 11. Invitations to Make Offers

~~The United States understands as follows: The provisions of Article 11 are consistent with, and are implemented under, rules of contract formation as currently applied as a matter of state law.~~

NOTE – Should this understanding be deleted and its substance be left to the Report of the Senate?

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IMPLEMENTATION

Ratify the Convention as a self-executing Treaty, subject to the foregoing Declaration^s and Understandings.

CONCLUSION

The widespread adoption of the Convention will make the law on the use of electronic communication in international business dealings clearer, sounder and more reliable than current law. Because of its close coincidence with E-Sign and the UETA, the text of the Convention will be familiar to American lawyers. Because of its deference to parties' intentions as well as its deference to international practice, the Convention will readily adapt even to the most unique and unusual transaction. Ratification of the Convention will facilitate international trade by American companies and sensible development of law dealing with international business transactions in courts all over the world.

Respectfully Submitted,