

For participants only
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**United Nations Commission on
International Trade Law**
Working Group on Electronic Commerce
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Draft report of the Working Group on Electronic Commerce on the work of its forty-third session

Addendum

IV. Electronic contracting: provisions for a draft convention

Article Y. Communications exchanged under other international conventions (continued)

Variant A, paragraph 2

1. The view was expressed that the reference to “any other international agreement or convention on private commercial law matters” unnecessarily restricted the application of paragraph 2. It was suggested that the draft convention could have value for many States in connection with matters other than those relating strictly to private commercial law. On that basis, it was suggested that the words “on private commercial law matters” should be deleted. Some support was expressed for that proposal.

2. A concern was expressed that the removal of the words “on private commercial law matters” could result in a State applying the draft convention to situations covered by other international instruments for which the provisions of the draft convention were not appropriate, which might run counter to that State’s obligations under those other instruments. However, it was noted that the possibility that a State might take legislative action that was inconsistent with its international obligations existed independently of paragraph 2. In response, it was emphasized that paragraph 2 did not impose obligations upon States but merely provided States with an opportunity to make a declaration that the draft convention applied to other international instruments. It was said that paragraph 2 had been premised on the assumption that a State would only make use of that option after it had undertaken a



thorough analysis to determine if its application was appropriate to the international instrument in question.

3. Nonetheless, in order to balance the concerns against overly broadening paragraph (2) with the desire to allow access to the regime of the draft convention to a broader range of instruments, it was suggested that paragraph 2 could refer to instruments bearing a relationship to the mandate of UNCITRAL. That suggestion was agreed to and the Secretariat was asked to revise paragraph 2 with language that tied the types of instruments to those that enhanced the mandate of UNCITRAL.

4. A suggestion was made to include the words "at any time" instead of the words "at the time of the deposit of its instrument of ratification, acceptance, approval or accession". It was said that that proposal was consistent with a decision already taken in respect of article Y (1) (see para. ... above). That suggestion was agreed to and the Secretariat was requested to revise paragraph (2) accordingly.

Variant A, paragraph 3

5. It was suggested that the phrase "or any specific provision thereof" should be deleted for the reason that a State choosing to adopt the draft convention should not be permitted to apply only some of the provisions of the draft convention. It was said that such an approach would create uncertainty as to which provisions of the draft convention applied in any given jurisdiction. However, some support was expressed for the retention of these words as it allowed States that could not adopt the Convention as a whole to at least apply part of the draft convention. That suggestion did not receive support. The Working Group agreed to delete the words "or any specific provision thereof".

6. It was suggested that, of the two bracketed texts set out in paragraph 3, the former text being "any of the above conventions" was preferred but that, given that paragraph 2 set out an option for States that was presumably revocable, whereas paragraph 1 imposed an obligation, the reference should be modified to read "any of the above conventions listed under paragraph (1)".

7. However, some support was expressed for the second bracketed text namely "one or more international agreements, treaties or conventions to which the State is a Contracting Party and which are identified in that State's declaration". It was suggested that that text allowed a State greater flexibility in dealing with any concerns it might have about the relationship of the draft convention to other international instruments to which it might be a party. It was said that the second bracketed text provided flexibility for States to ensure that a matter that it did not want covered was in fact not covered and it was said that that flexibility would facilitate adoption of the draft convention. In response it was noted that the concern could be met by providing that the convention only applied to contracts covered by conventions listed in paragraph 1 or not covered by any international instrument. To that end, the words "including any of the conventions listed in paragraph (1)" could be added following the words "any of the above conventions".

8. A question was raised as to the scope of article Y in respect of contracts that would become subject to international instruments in the future. For example, in the case of a contract relating to the licensing of software, unless it was excluded in article 2 of the draft convention, it would fall within the scope of the draft convention. If, however, a convention relating to that subject matter was

subsequently made, then that contract would fall outside the draft convention on the basis that that later convention was neither listed in paragraph 1 nor the subject of a declaration under paragraph 2. In response it was said that, in that case, if the State wished the draft convention to apply, it would ensure that a reference was made in the later convention, or would submit a declaration in respect of that convention under paragraph 2 of article Y. In any event, that concern was not logically related to the draft paragraph and should be discussed in relation to article 1 (see also para. ... below).

9. Having regard to the differing views as to the appropriate interpretation of the draft article, a proposal was made to combine the two bracketed texts currently contained in paragraph 3 to the effect that any State might declare at any time that it would not apply the draft convention to international contracts that fell within the scope of one or more international agreements, treaties or conventions, including those listed under paragraph 1, to which the State was or might become a party and which were identified in that State's declaration.

10. A suggestion was made that the reference to "international contracts" was not consistent with the drafting approach taken in paragraphs 1 and 2 which focused on exchanges by means of data messages of any communications relating to an international agreement. It was agreed that the Secretariat should review the language used in paragraph 3 and align it with other paragraphs of article Y.

Variant A, paragraph 4

11. It was agreed that paragraph 4 should be reformulated so as to align the text with the amendments that had been agreed to in paragraph 3 of article X (see para. ... above). On that basis it was decided that language along the lines of that contained in the first sentence of paragraph 3 of article 97 of the United Nations Sales Convention should be included in paragraph 4. Subject to those amendments, the Working Group agreed to retain the text of paragraph 4.