

## COMMENTARIES ABOUT THE UNITED NATIONS CONVENTION ON USE OF ELECTRONIC COMMUNICATIONS IN INTERNATIONAL CONTRACTS

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*SUMMARY: Section I. I. Introduction. II. Objectives of this Convention. III. Governing Criteria in the Elaboration of the Convention. Section II. General Provisions. Section II. General provisions. IV. Definitions of Concepts in the Convention. V. Concept of Communication. VI. The Notion of Electronic Communication. VII. The Definitions of Originator and Addressee. VIII. The Concept of Information System. IX. Definition of Automated Message System. X. Concept of Place of Business. XI. Interpretation of the Convention. XII. The Matters Where Are not Expressly Settled at the Convention. XIII. The Location of the Parties. XIV. Nature of Presumptions of Location. XV. Plurality of Places of Business. XVI. Place of Business of Natural Persons. XVII. Limited Value of Communications Technology and Equipment for Establishing Place of Business. XVIII. Conclusions.*

### I. INTRODUCTION

During 38th period of meetings of United Nations Commission on International Trade Law Meeting at Vienna in 2005, approve the United Nations Convention on the Use of Electronics Communications in International Contracts (after the Convention), prepared by the Working Group IV on Electronic Commerce.

The work that I'm going to expose will concern only in a series of commentaries about article 4 in Definitions, article 5 about Interpretation and article 6 in Location of the parties.

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Before the explanation of my work, we must remember the objectives, the director's criteria for the elaboration of this international instrument, which is the convention.

## II. OBJECTIVES OF THIS CONVENTION

The Convention is an international instrument whose fundamental purpose is to facilitate international trade by removing possible legal obstacles or uncertainty concerning the use of electronic communications in connection with the formation or performance of the contracts concluded between parties located in different countries.

The use of electronic means in connection with the formation or performance in contracts may be an important help to development of commerce, but, at the same time, generate problems and juridical uncertainty.

Through United Nations it has been tried to cause juridical safety, which facilitate the development of electronic commerce in an international area, and, at the same time, in a local and national scope. That's the reason by which the Commission has been elaborate texts that we have mentioned before, giving origin to an uniform law about electronic commerce.

It is tried to eliminate uncertainty as far as the effectiveness of electronic communications, through the creation of a juridical instrument directly applicable, which is precisely the Convention that we analyze. It is been hope that principles and rules contain by the UNCITRAL Model Law on Electronic Commerce (UMLEC) and the UNCITRAL Model Law on Electronic Signature (UMLES) form now part of an international juridical text, that has the nature of Objective Law, directly apply for countries to subscribe and ratified this convention.

In synthesis, "*the purpose of the Electronic Communications Convention is to offer practical solutions for issues related to the use of electronic means of communication in connection with international contracts*".<sup>1</sup>

## III. GOVERNING CRITERIA IN THE ELABORATION OF THE CONVENTION

The first basic criteria consist of which by means the Convention is not intended to establish a set of uniform rules for substantives contractual issues

<sup>1</sup> See A/CN.9/608, para. 3, Explanatory Note of the Secretariat of the Commission on the international text matter of this study.

that are not specially related to the use of electronic communications. The settlement of substantive rules concerning the contracts belong to the local laws of the different countries, with the goal of the Convention having more possibilities of being adopted by a great number of states and Regional Economic Integration Organizations. However, the Convention contains a few substantive rules with the purpose of extends the application of the principle of functional equivalence, where substantive norms are needed in order to ensure the effectiveness of electronic communications.

A notable exception to the maintenance of the first general criteria is constituted by the provisions concerning the offers addressed to non-determined targets through electronic means, that consider simple invitations to make offers, unless it clearly indicates the intention of the party making the proposal to bound in case of acceptance. Another exception to this basic criteria is the validity or enforceability of a contract formed by the interaction of an automated message system and a natural person, or only by the interaction of automated message system.

The second governing criteria it consist in which the Convention is not confined to a determined contract, like the United Nations Sales Convention, but that is formulated norms with a very general character, which they do not imply change, in no country, of the right noun of contracts in general nor of any contract in special. At the terms of the Convention the word “*contract*” should be understood broadly so as to cover any form of legally binding agreement between two parties that is no explicitly or implicitly excluded from the Convention, whether or not the word “contract” is used by the law or the parties to refer to the agreement in question. For instance, the arbitration agreements in electronic form are included into broad sense of word “contract” according to the Convention, even though the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and most national laws do not use the word “contract” to refer them.

The third governing criteria followed in the elaboration of the international instrument that occupies to us, it consisted of returning to take some solutions already given by UNCITRAL respect to the main matters of the electronic commerce and, at the same time, to be filling the emptiness that these had by means of the incorporation of new dispositions, such us the use of automated message systems for contract formation and the error in electronic communications.

## SECTION II GENERAL PROVISIONS

### IV. DEFINITIONS OF CONCEPTS IN THE CONVENTION

The article 4, of the international instrument defines the main concepts that form the essential matters of their content.

The article 4 of the Convention is structured on the base of article 2, of the UNCITRAL Model Law on Electronic Commerce, whose basic concept was the one of “*data message*”, but in the case of the Convention, assuming the idea of data message, turns around a well formed concept but, that is the one of “*electronic communication*”, notion that, by the others serves to give the name to the international text which we analyzed.

First the communication idea is defined, to define but ahead the electronic communication, the one that is constructed on the base of the idea of *data message* removed from the UNCITRAL Model Law on Electronic Commerce (UMLEC), like the others definitions of article 4 of the Convention.

### V. CONCEPT OF COMMUNICATION

According to the tenor of article 4 in its letter a): “*Communication*” means any statement, declaration, demand, notice or request, including an offer and the acceptance of an offer, that the parties are required to make or choose to make in connection with the formation or performance of a contract”.

It can show that it is not a generic concept of communication. The definition of “communication” is intended to make clear that the Convention applies to a wide range of exchanges of information between parties to a contract, whether at the stage of negotiations, during performance or after a contract has been performed, to be coherent with the objective of this international instrument.

### VI. THE NOTION OF ELECTRONIC COMMUNICATION

The letter b) of the same article, said that “*Electronic communication* means any communication that the parties make by means of data messages”. In consequence, the definition of “electronic communication” establish a link between the purposes of which electronic communication may be used and the notion of “*data message*” contained in the UNCITRAL Model Law

on Electronic Commerce and has been retained in view of the wide range of techniques it encompasses, beyond purely “electronic techniques”.<sup>2</sup>

At terms of letter c) of the article 4, of the Convention: “*Data message means information generated, sent, received, or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange, electronic mail, telegram, telex or telecopy*”. This definition is removed from the literal tenor of the article 2 of UNCITRAL Model Law on Electronic Commerce.

It is possible to be noticed that one is a very ample definition that gets to include until the telegram, as it became in 1996, when the UNCITRAL Model Law on Electronic Commerce was elaborated, although it thought it to have excluded in the Convention of 2005, in the end was considered to maintain it not to introduce uncertainty elements changing the idea that had taken from the alluded to model law.

The definition of “*data message*” is aimed to encompass all class of messages that are generated, stored, or communicated in essentially paperless form. For the effects of the Convention the word “*similar*” connote “functionally equivalent”. The reference to “*similar means*” indicates that the international instrument is not intended only for application in the context of existing communications techniques but also to accommodate futures technical developments.<sup>3</sup>

## VII. THE DEFINITIONS OF ORIGINATOR AND ADDRESSEE

After the definitions of electronic communication, immediately article 4, of the Convention made position defining concepts of “*Originator*” and “*Addressee*” that are basic respect to all electronic communications, and those communications in connection with the formation or performance in international contracts, are the means matters of the Convention.

In general sense we could say that the “originator” is the one that generates the information that is object of the communication. However, the concept of “originator” should cover not only the situation where information is generated and communicated, but also the situation where such information is generated and stored without being communicated.<sup>4</sup> Lastly the definition of originator is intended to eliminate the possibility

<sup>2</sup> See A/CN.9/571, para. 80.

<sup>3</sup> See Explanatory Note of UNCITRAL secretariat for this Convention, para. 92.

<sup>4</sup> See Explanatory note by UNCITRAL Secretariat on the United Nations Convention on the Use of Electronic Communications in International Contracts para. 97.

that a recipient who merely store a data message might be regarded as an originator.

The “*addressee*” is the person to whom the originator intends to communicate by transmitting the electronic communication, as opposed to any person who might receive, forward or copy it in the course of the transmission. The originator is the person who generated the electronic communication even if the communication was transmitted by other person. The definition of “*addressee*” contrasts with the definition of “*originator*”, which is not focused on intent.

Under the definitions of “*originator*” and “*addressee*” in the Convention, the originator and the addressee of a given electronic communication could be the same person, for instance in the case where the electronic communication was intended for storage by its author.

However, the addressee who store an electronic communication transmitted by someone else is not intended to be covered by the definition of “*originator*”.

The focus of the international instrument that we commented is on the relationship between the originator and the addressee, and not on the relationship between either the originator or the addressee and any intermediary, such as servers or web hosts. The Convention not ignore the role of the intermediaries in receiving, transmitting or storing data message on behalf of the other persons. Nevertheless, the Convention is not conceived as a regulatory instrument for electronic business, it does not deal with the rights and obligations of intermediaries.<sup>5</sup>

To the literal tenor of article 4, letter d) “*Originator of an electronic communication means, a party by whom, or on whose behalf, the electronic communication has been sent or generated prior to storage, if any, but it does not include a party acting as an intermediary with respect to that electronic communication*”.

Lastly at literal terms of article 4, letter e): “*Addressee of an electronic communication, means a party who is intended by the originator to receive the electronic communication, but does not include a party acting as an intermediary with respect to that electronic communication*”.

## VIII. THE CONCEPT OF INFORMATION SYSTEM

According to article 4 section f) of the Convention: “*Information system*” means a system for generating, sending, receiving, storing or otherwise processing data messages”.

<sup>5</sup> See Explanatory note by UNCITRAL secretariat on the Convention, para. 99, p.39.

The defined concept was extracted of the UMLEC, and it is intended to cover the entire range of technical means used for transmitting, receiving and storing information. The notion of “information system” could refer to a communications network, and in the other instances could be include an electronic mailbox or even a telecopier.

The concept defined by the article 2 letter f), of the UMLEC is different of the idea defined at the Convention, because the UNCITRAL Model Law on Electronic Commerce tour around on the basic idea of “*data message*”, whereas the Convention makes respect to the notion of “*electronic communication*”.

## IX. DEFINITION OF AUTOMATED MESSAGE SYSTEM

A newness of the Convention respect to UMLEC, is the introduction of the concept of “*Automated message system*”, where this notions is not defined. At the terms of article 4, letter g): “*Automated message system, means a computer program or anelectronic or other automated means used to initiate an action or respond to data messages or performances in whole or in part, without review or intervention by a natural person each time an action is initiated or a response is generated by the system*”.

This definition facilitates the understanding of the case anticipated in article 12 of the Convention, relative to the use of automated systems in connection with the formation or performance of a contract. The notion of “automated message system” concern essentially to a system for automatic negotiation and conclusion of contracts without intervention of a person, at least on one of the end of the negotiation chain. It differs from “information system in that its primary use is to facilitate exchanges leading to contract formation. An automated message system may be part of an information system, but that need no necessarily be the case.

The essential element in definition of automated message system is the lack of an human actor on one or both sides of a transaction. For instance, if a party orders goods through a website, the contract would be an automated transaction because the vendor took and confirmed the order via its machine. Another case of an automated transaction will be the situation when both parties do the business through Electronic Data Interchange (EDI).

## X. CONCEPT OF PLACE OF BUSINESS

The definition of “Place of business is very important fort the effects of the anticipated thing in articles: 1, scope of application; 6, location of

the parties; 10, time and place of dispatch and receipt of electronic communications; 17, paragraph 4, participations by Regional Economic Integration Organizations; and 18, effect in domestic territorial units.

At the terms of article 4 letter h) “*Place of business*” means any place where a party maintains a non-transitory establishment to pursue an economic activity other than the temporary provision of goods or services out of a specific location”.

This is a concept that emphasizes the space character, that is to say, the physical and geographic location, like thus also the development of a stable, non-transitory economic activity.

The notion “*Place of business*”, is a basic concept specially in relation to article 6, of the Convention, that regulates the criteria to determine the location of the parties that communicate through electronic means.

The idea of “*no transitory*” qualifies the word “*establishment*”, whereas the words “*other than temporary provision of goods or services*” qualify the nature of the “*economic activity*”.

Lastly the definition of “*place of business*” reflects the essential element of the notion on “*place of business*”, as understood in international practice, and “*establishment*”, as used in article 2, subparagraph f), of the UN-CITRAL Model Law on Cross-Border Insolvency. The definition is not intended to affect other substantives law relating to place of business.

## XI. INTERPRETATION OF THE CONVENTION

According to article 5, of the international instrument that we analyzed:

1. *In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.*

2. *Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.*

Those same norms of interpretation have appeared in most of the UNICITRAL texts, such as Model Laws or International Conventions. Its formulation mirrors article 7 of United Nations Sales Convention.

The provision is aimed at facilitating uniform interpretation of the provisions in uniform instruments on international commerce law.

It is a practice followed in private law conventions to provide self-contained rules of interpretation for to avoid the use of general rules of public

international law on interpretation of the treaties which are not suitable for the interpretation of private law provisions.

Good faith is a principle with special relevance in the scope of the electronic communications in connection with the formation or performance in international contracts, for that reason the Convention considers it like the angular stone on which the development of the international trade is sustained, demanding that they are guarded by their concrete application. In effect, by the fact which in our days it exists a preoccupation by the security in contracts or operations made by electronic means, it is advisable that the principle of the good faith stays next to the credit as essential foundations of the development of the commerce.

Nevertheless, the Convention does not intend to prevent nor to prevent the commission of frauds or crimes in general in the scope of the international trade; it is not either function because these matters belong to the Penal Law.

## XII. THE MATTERS WHICH ARE NOT EXPRESSLY SETTLED AT THE CONVENTION

In paragraph 2 of the article 5, Convention alludes not only to its interpretation but of its application. In effect questions concerning matters governed by the instrument which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in absence of such principles, in conformity with the law by virtue of the rules of private international law.

The principle of the good faith had been gathered long ago in the Code of Spanish Commerce, article 57 and in the article 1536, of the Chilean Civil Code, that inspired by the French civil Code of 1804, indicate with identical literal tenor that:

*“Contracts will be formed and fulfilled of good faith, according to the terms in which they are written up...”*

Following this same direction, article 26 of Law 34/2002, 11 of July, on Services of the Society of the Information and of Electronic Commerce, it establishes very textually that:

*“For the determination of the law applicable to electronic contracts one will be to the arranged thing in the norms of the Private International Law of the Spanish legal ordering, having to take in consideration to its application the established thing in articles 2 and 3 from this Law”*.

### XIII. THE LOCATION OF THE PARTIES

The location of a party's place of business is an essential element to determine the scope of application of the Convention, in conformity of article 1. As the purpose of the Convention, the word "parties" includes both natural persons and legal entities. However, a few provisions of the international instrument refer specifically to "natural person", like the case of the location of a natural person who have not place of business.

The international instrument does not contemplate a duty for the parties to indicate their places of business, but establishes a certain number of presumptions and default rules aimed at facilitating a determination of party's location.

According to the article 6: "*For the purpose of this Convention, a party's place of business is presumed to be the location indicated by that party, unless another party demonstrate that the party making the indication does not have a place of business at that location.*"

### XIV. NATURE OF PRESUMPTIONS OF LOCATION

This first presumption is a *uris tantum* presumption, that can be rebutted by the demonstration of the another party that the party making the indication does not have a place of business at that location. At the terms of the Explanatory note by the UNICITRAL secretariat on the Convention: "The article 6 is not intended to allow parties to invent *fictional places of business* that do not meet the requirements of article 4, subparagraph (h). The presumption, therefore, is not absolute and the Convention does not uphold an indication of a place of business by a party even where such an indication is inaccurate or intentionally false."<sup>6</sup>

In article 6, relative to the location of the parties, the Convention adopts the criterion of a *reallocation of the party's place of business*, in against position of one tried *virtual location* in the "cyberspace", derived from the fact that the parties are using electronic communications in connection with the formation or performance in international contracts.

### XV. PLURALITY OF PLACES OF BUSINESS

When a party has not indicated a place of business and has more than one place of business, then the place of business for the purposes of the

<sup>6</sup> See A/CN.9/509, para. 47.

Convention it that has the closest relationships to the relevant contract, having regard to the circumstances know to or contemplated by the parties at any time before or at the conclusion of the contract.

Paragraph 2 of article 6 is based on article 10, subparagraph (a) of the United Nations Sales Convention. Nevertheless, unlike that provision, which refers to place of business that has “*the closest relationship to the contract and its performance*”, article 6, paragraph 2 of the Electronic Communications Convention refers only the closest relationship *to the contract*. At the United Nations Sales Convention the cumulative reference to the contract and its performance had given rise to uncertainty, since there might be situation where a given place of business of one of the parties more closely connected to the contract, but another of that party’s places of business is more closely connected to the performance of the contract. The Electronic Communications Convention would not generate a duality of regimes in view of their limited scope.<sup>7</sup>

#### XVI. PLACE OF BUSINESS OF NATURAL PERSONS

However, if the contracting part is a natural person who does not have establishment, for the effects of its location, considers *the place of its residence*.

#### XVII. LIMITED VALUE OF COMMUNICATIONS TECHNOLOGY AND EQUIPMENT FOR ESTABLISHING PLACE OF BUSINESS

At the terms of article 6, paragraph 4, a location is not a place of business merely because that is:

- a. *where equipment and technology supporting an information system used by a party in connection with the formation of a contract are located; or*
- b. *where the information system may be accessed by other parties.*

Given the circumstance of the use of computers as electronic means in connection with the formation or performance in international contracts, the sole fact that a party use of a domain name or electronic mail address connected to a specific country, does no create a presumption that its place of business is located in that country. However, nothing in the Convention prevents a court of justice or arbitrator from taking into account the assignment of a domain name as a possible element, among others, to determine a party’s location, where appropriate.<sup>8</sup>

<sup>7</sup> See A/CN.9/571, para.101.

<sup>8</sup> See: A/CN.9/571, para. 113.

The Law on Services of the Society of the Information and on Electronic Commerce of Spain, uses the same realistic criterion of the place of business or residence in the case of natural person, for the location of the parties, whenever in them the management or direction of the businesses is carried out and also establishes a presumption when an inscription in the Mercantile Registry or another public registry exists, but the situation of technological means by itself does not represent an element sufficient to determine the place of business.

The Explanatory note by UNCITRAL secretariat on the Convention, said that *“the purpose of article 6 is to offer elements that allow the parties to ascertain the location of the places of business of their counterparts, thus facilitating a determination, among other elements, as to the international or domestic character of a transaction and the place of contract formation. As such, this article is one of the central provisions in the Electronic Communications Convention”*.<sup>9</sup>

## XVIII. CONCLUSIONS

The definitions of the concepts that we have analyzed are essential to determine the sense and reaches of the text of the Convention, because they must be understood in the meaning that agree with the objectives and with the principles by which she is inspired.

The jurisdiction of a determined State adopting this Convention, in its interpretation must be regard its international character and to the need to promote uniformity in it application and the observance of the good faith in the international trade.

Concerning the application of the international instrument, matters that are governed by the Convention which they are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in absence of such principles, in accordance with the applicable law by virtue of the rules of private international law.

As far as the location of the parties it seems to us suitable that the Electronic Communications Convention does not contemplate a duty of the parties to disclose their places of business, but establishes a certain number of presumptions and default rules aimed at facilitating a determination of a party's location. A primary importance is attributed to the party's indication of its relevant place of business, unless another party demonstrates that the party who made this indication does not have place of business at this location.

<sup>9</sup> See: Explanatory note by UNCITRAL secretariat for this Convention, para.108.

Moreover those presumptions established into article 6, are one of the central provisions for the scope of application of the Convention in connection with the formation of performance of a contract between parties whose places of business are in different States.

Finally we reiterated that the essential objective of the Convention is to establish uniform rules intended to remove obstacles to the use of electronic communications in international contracts, including obstacles that might result from the operation of existing international trade law instruments, with a view to enhancing legal certainty and commercial predictability.