

# United Nations Convention on the Use of Electronic Communications in International Contracts 2005

## Introduction

- 4.1 The *United Nations Convention on the Use of Electronic Communications in International Contracts* (the Convention) is the first United Nations Convention to address legal issues arising from the digital economy.<sup>1</sup>
- 4.2 The Convention was developed by the United Nations Commission on International Trade Law (UNCITRAL).<sup>2</sup> Australia is currently a member of UNCITRAL and has recently been re-elected as a member for six years.<sup>3</sup>
- 4.3 Eighteen countries have signed the Convention, including some of Australia's main trading partners: the Republic of Korea; China; and Singapore.<sup>4</sup>

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1 *National Interest Analysis (NIA)*, [2010] ATNIA 33, *United Nations Convention on the Use of Electronic Communications in International Contracts*, done at New York on 23 November 2005 [2010] ANTIF 47, para. 7.

2 NIA, para. 7.

3 NIA, para. 7.

4 Ms Helen Daniels, Attorney-General's Department, *Transcript of Evidence*, Canberra, 7 February 2011, p. 17.

## Convention's purpose

- 4.4 The Convention is based on the principles of functional equivalence and technological neutrality:<sup>5</sup>

'Functional equivalence' refers to the establishment of international standards for the recognition of electronic communications as the legal equivalent of paper based documentation.<sup>6</sup>

The Principle of 'technological neutrality' refers to the accommodation of technological developments in the field of e-commerce by incorporating flexibility into the methods of recognising electronic communications.<sup>7</sup>

- 4.5 The Convention is based on previous efforts to regulate electronic contracts, in particular, the *Model Law on Electronic Commerce 1996*, which was also developed by UNCITRAL.<sup>8</sup>
- 4.6 The *Model Law on Electronic Commerce 1996* established the principles of electronic commerce outlined above, but was not a binding instrument. The Convention is a binding document that updates and introduces some refinements in many of the core provisions to take into account the greater use and knowledge of the electronic environment.<sup>9</sup>
- 4.7 The Convention will establish uniform rules regarding the use of electronic communications in connection with the formation or performance of a contract between parties whose places of business are in different signatory countries<sup>10</sup> by requiring contracting states to bring their domestic legislation into compliance with the Convention.<sup>11</sup>
- 4.8 According to the Attorney-General's Department, accession to the Convention will:
- enhance legal certainty and commercial predictability where electronic communications are used in relation to international contracts;<sup>12</sup>

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5 NIA, para. 11.

6 NIA, para. 11.

7 NIA, para. 11.

8 NIA, para. 7.

9 NIA, para. 8.

10 NIA, para. 5.

11 NIA, para. 11.

12 NIA, para. 5.

- facilitate international trade and commerce by offering practical solutions for issues arising out of the use of electronic communications;<sup>13</sup>
- facilitate the use of electronic communications in international commerce as reflected in Free Trade Agreements;<sup>14</sup> and
- ensure that Australia remains up to date with international rules governing paperless communication in international commerce.<sup>15</sup>

## Obligations

4.9 The Convention obliges contracting states to adopt domestic legislation that accords with the Convention's definitions and regulations concerning the use of electronic communications for commercial contracts between signatory countries.<sup>16</sup>

4.10 The Convention does not apply to:

- contracts concluded for personal, family or household purposes;
- foreign exchange transactions;
- interbank transfers; and
- the transfer or purchase of securities or other financial instruments.<sup>17</sup>

4.11 In addition, the Convention does not deal with issues of inequality of bargaining power in contracts between consumers and retailers:

It is really for dealing business to business... it is not really even about the terms of the contract. It is really for when things go wrong.<sup>18</sup>

## Specific provisions

4.12 Article 3 of the Convention preserves the right of those entering into contracts to vary or exclude the provisions of the Convention. Parties to a

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13 NIA, para. 5.

14 NIA, para. 6.

15 NIA, para. 8.

16 NIA, para. 11.

17 Article 2, para. 1.

18 Ms Daniels, Attorney-General's Department, *Transcript of Evidence*, Canberra, 7 February 2011, p. 20.

commercial contract can expressly derogate from the Convention if they so agree.<sup>19</sup>

- 4.13 The Convention excludes from its application persons who send or receive electronic communications on behalf of another person. The Convention only applies to the originator and the addressee of the electronic communication, not parties acting on their behalf.<sup>20</sup>
- 4.14 Where matters are not expressly settled by the Convention, they are to be settled in accordance with the general principles on which the Convention is based.<sup>21</sup>
- 4.15 Article 6 of the Convention provides a set of presumptions and default rules to determine for contractual purposes the place of business of the parties to an electronic contract.<sup>22</sup>
- 4.16 Article 8 provides that a contract shall not be denied validity or enforceability on the sole ground that it is in the form of an electronic communication. However, the Convention does not force a party to accept electronic communications and does not purport to vary existing contract law.<sup>23</sup>
- 4.17 Article 9 establishes minimum standards for contracts but only applies in so far as laws in the signatory country exist to regulate such requirements in a contract,<sup>24</sup> including that:
- nothing in the Convention requires a communication or a contract to be made or evidenced in any particular form;<sup>25</sup>
  - where a law requires that a communication or a contract should be in writing, the Convention will have been met if the electronic communication is accessible for future reference;<sup>26</sup>
  - where a law requires that a communication or contract be signed, that requirement is met if a reliable method is used to identify the party to the electronic communication and to indicate the party's intention in

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19 NIA, para. 13.

20 Article 4.

21 Article 5, para. 2.

22 NIA, para. 13.

23 Article 8, paras. 1 and 2; NIA, para. 13.

24 NIA, para. 14.

25 Article 9, para. 1.

26 Article 9, para. 2.

respect of the information contained in the electronic communication;<sup>27</sup>  
and

- where a law requires that a contract should be retained in its original form, that requirement is met if there is a reliable assurance as to the integrity of the information it contains from the time when it was first generated in its final form.<sup>28</sup>

4.18 Article 10 provides default rules to determine the time of dispatch and receipt of an electronic communication. An electronic communication is defined as having been sent when it leaves the information system under the control of the originator or, if it does not leave the information system controlled by the originator, then the time the electronic communication is received.<sup>29</sup>

4.19 This Article also recognises the effect on the receipt of electronic communications arising from the increasing use of security filters and other technologies restricting the receipt of unwanted or potentially harmful communications. Consequently, the electronic communication is deemed to have been received when it is capable of being retrieved by the addressee.<sup>30</sup>

4.20 Article 11 clarifies the extent to which parties offering goods or services through open, generally accessible communications systems, such as websites, are bound by advertisements made by providing rules about what is an invitation to treat in the electronic context.<sup>31</sup>

4.21 Article 12 concerns the use of automated message systems and recognises that the absence of human intervention does not by itself preclude the conclusion of a valid contract.<sup>32</sup>

4.22 Article 14 provides a right of withdrawal for an input error made in transactions between a person and an automated message system where the system does not provide the person with the opportunity to correct the error.<sup>33</sup>

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27 Article 9, para. 3.

28 Article 9, para. 4.

29 Article 10, para. 1; NIA, para. 15.

30 Article 10, para. 2; NIA, para. 15.

31 NIA, para. 16.

32 NIA, para. 17.

33 NIA, para. 18.

## Electronic Transactions Acts

- 4.23 The Commonwealth, States and Territories all have Electronic Transaction Acts based on the 1996 Model Law.<sup>34</sup>
- 4.24 Acceding to the Convention requires harmonisation of Australia's various Electronic Transaction Acts with the international standards contained in the Convention.<sup>35</sup> According to the Attorney-General's Department, the amendments required are minor.<sup>36</sup>
- 4.25 The process of accession began in April 2007, when the Standing Committee of Attorneys-General (SCAG) agreed to consider updating the model Commonwealth, State and Territory electronic transactions legislation in light of the proposal to accede to the Convention.<sup>37</sup>
- 4.26 The Commonwealth prepared a discussion paper on changes that would be required to the uniform electronic transactions regime for SCAG officers to consider. The consultation paper contained an article by article analysis of the Convention, the differences between the Convention and Australian law, and proposed amendments to the current regime.<sup>38</sup>
- 4.27 On 10 November 2008, the Commonwealth Attorney General launched a consultation paper seeking comments on the proposal to accede to the Convention. In addition, the Attorney General wrote to peak business groups and law societies seeking submissions.<sup>39</sup>
- 4.28 Nine submissions were received and all were positive and supported Australia's accession to the Convention.<sup>40</sup>
- 4.29 Model provisions to amend the various Electronic Transactions Acts have been drafted and approved by the SCAG.<sup>41</sup>
- 4.30 To date, no Australian company has tested the Electronic Transactions Acts in court. A representative of the Attorney-General's Department advised that:

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34 NIA, para. 8.

35 NIA, para. 9.

36 NIA, para. 23.

37 NIA, para. 30.

38 NIA, para. 31.

39 NIA, para. 36.

40 NIA, para. 38.

41 NIA, para. 24.

...if things do go wrong, then a company has somewhere to turn, but it seems that... companies are sorting out the problems themselves.<sup>42</sup>

## Conclusion

4.31 The Committee notes that, to date, businesses with disputes relating to electronic contracts have not sought to use legal means to resolve their differences. The Committee believes the Convention will ensure that, when the inevitable legal dispute arises, the Australian legal system will be in a position to ensure that the internationally accepted process for resolving disputes is applied.

### Recommendation 2

**The Committee supports the *United Nations Convention on the Use of Electronic Communications in International Contracts* and recommends that binding treaty action be taken.**

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42 Ms Daniels, *Transcript of Evidence*, 7 February 2011, p. 19.

