International electronic contracting in the newest UN Convention*

Paul Przemyslaw Polanski
Warsaw University
ppolanski@wpia.uw.edu.pl

Abstract. On 23 November 2005, the United Nations General Assembly adopted a new Convention on the Use of Electronic Communications in International Contracts. Eight countries including China and Singapore signed it but the Convention is not binding yet as it still requires the ratification by three states. This paper analyses the most important provisions of this Treaty related to electronic contracting.

1. Introduction

A year ago, the United Nations General Assembly adopted a Convention on the Use of Electronic Communications in International Contracts (United Nations 23 November 2005). As of November 2006, only eight states including Central Republic of Africa, China, Lebanon, Madagascar, Senegal, Sierra Leone, Singapore and Sri Lanka have signed it. However, none of the states have ratified it yet. One of the potential reasons for the slow adoption of the Convention might be the lack of international promotion of this instrument by the United Nations among users, businesses and governments.

It is the first international convention designed specifically for international business-to-business electronic commerce. Other international treaties, such as the Council of Europe Convention on Cybercrime, was intended to facilitate the enforcement of law with respect to crimes committed online such as hacking, child pornography or hate speech (Council of Europe 23 November 2001). On the other hand, international treaties such as the 1980 Vienna Convention on Contracts for the International Sale of Goods (UNCITRAL, 1980) were drafted in the era of faxes and telegrams, which is visible in their provisions (Bianca and Bonell ,1987; Audit, 1998; Eiselen, 1999). The new Convention fills a regulatory gap that has existed in this respect and gives new life to old international conventions that deal with traditional international commerce.

The aim of this article is to give a brief account of its most important provisions, particularly those related to electronic contracting. The research method will be based on the analysis of preparatory works contained in numerous reports prepared by Working Group IV of the United Nations Commission on International Trade Law. The present contribution will also draw upon and expand earlier commentaries of this instrument (Polanski, 5-7 June 2006; Chong and Chao, 2006; Connolly and Ravindra, 2006; Polanski, 2006).

The first part will present some basic facts about the Convention including its aim, scope of application and its content. The second part will be devoted to the analysis of specific provisions of the Convention on electronic contracting. In the third part, an attempt will be made to assess its advantages and disadvantages for global electronic commerce.

2. Overview of the Convention

The Convention was drafted by the United Nations Commission on International Trade Law Working over six sessions since 2002. It has been influenced by earlier works of UNCITRAL, especially the CISG and the Model Law on Electronic Commerce. The influence of the former is particularly visible in the adoption of two principles of functional equivalence (which assumes that paper-based transactions and electronic transactions should be treated equally) and technology neutrality (which assumes that none of the technologies is favoured by law). On the other hand, some provisions were directly copied from the Vienna Convention. However, the Treaty does not establish substantive rules on contract formation or sets out rights and duties for entrepreneurs akin to the CISG.

The Convention is short and consists of a Preamble and 25 articles. It is organized into four chapters. The first part delineates the sphere of application of the instrument. The second chapter contains general provisions, including the definitions of the terms used. Chapter III, which covers the use of electronic communications in international contracts, contains provisions on legal recognition of electronic communications, form requirements, time and place of electronic communications, invitation to make offers, use of automated systems for contract formation, availability of contract terms and the treatment of input error. The last part contains final provisions.

---

* A version of this paper was published in Kierkegaard, S. (2006) Business Law and Technology Vol.1 and presented in the 2006 IBLT Conference, Denmark.

2.1 The aim of the Convention

The purpose of the Convention is to offer practical solutions for issues related to the use of electronic means of communication in international contracts. The drafters of this instrument wanted it to apply not only to electronic contracts per se but also to communications made during the negotiations or contract performance (e.g. notices of receipt, notices of fault etc).

In particular, the aim of the Convention is to remove legal obstacles to electronic commerce, including those which arose under other instruments (UNCITRAL, 11- 22 October 2004). The unique technique of this Convention can be found in Article 20, which has the goal of removing obstacles to e-commerce found in other international instruments adopted before the Internet era. According to this provision, electronic contracts are given full recognition whenever the older conventions apply. [1][1] The only condition is that an online company has a place of business in a contracting state of this Convention.

As a result, the rules of older conventions such as 1980 Vienna Convention on International Sale of Goods or the 1958 New York Convention on International Arbitration would be given full effect in case of a dispute involving electronic exchange of messages. For example, the term "writing" as used in the 1980 Sale of Goods Convention would be extended to cover electronic writing and therefore conventional rules on formation of contracts and rights and obligations of parties would apply. In consequence, companies having their places of business in a contracting state to this Convention would have the advantage over companies located in other states because they could be certain that electronic contracts would be honoured in courts despite the lack of tangible form (Boersma, 1998).

The technique adopted in this Convention is a wise strategy, as it is much easier to give new meaning to older conventions than to renegotiate all of them. Without an attempt to broaden the scope of older conventions, international e-commerce would be left with a very limited legal framework, which would not guarantee legal security. It is so at least with respect to written norms, as there are numerous unwritten Internet customs particularly in the area of online contracting, security and property that could help to fill in a regulatory gap (Polanski, 5-7 June 2006). However, the Convention contains elaborate rules that permit states to change the scope of the Convention and hence, introduce the legal uncertainty that it aims to avoid (Connolly and Ravindra,2006).

2.2 Sphere of application

The Convention regulates the use of electronic communications in electronic contracting between parties whose places of business are in different states. “Electronic communication” includes any statement, declaration, demand, notice or request, including an offer and the acceptance of an offer, made by electronic, magnetic, optical or similar means in connection with the formation or performance of a contract. The Convention applies not only to data exchanged over the Internet using web pages or e-mail, but also extends to older technologies such as Electronic Data Interchange (EDI) or even telefax, telex and telegram (art. 4 (c)). The term contract is also given a wide meaning to include not only contracts of sale or services but also e.g. arbitration agreements. Furthermore, pre- and post-contractual communications will also be covered e.g. electronic notices sent during the performance of the contract. Nationality or character of online entrepreneurs (civil or commercial) is irrelevant. In other words, the Convention applies to any transactions performed electronically provided that commercial parties are located in different states.

The Convention will always apply to contracts between parties located in two states that are contracting states. This formulation departs from the United Nations Sales Convention, which applies only when both parties are located in contracting states (or rules of private international law so decide). Therefore, the new Convention will also govern the dispute if only one party is located in a state that ratified this Convention. It is clear from the preparatory materials that the provisions of the new Convention will only be used in a dispute involving international electronic commerce if the laws of a contracting state applied to the underlying transaction (A/60/17, para. 20). In other words, parties to an electronic contract can be located in any two states, but at least one of these states must be the contracting state or the laws of that state must point to the law of the other contracting state.

[1] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958); Convention on the Limitation Period in the International Sale of Goods (New York, 14 June 1974) and Protocol thereto (Vienna, 11 April 1980); United Nations Convention on Contracts for the International Sale of Goods (Vienna, 11 April 1980); United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 19 April 1991); United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 11 December 1995); United Nations Convention on the Assignment of Receivables in International Trade (New York, 12 December 2001). Furthermore, the provisions of the Convention also apply to other conventions than those mentioned above, but a Contracting State may declare that it is not bound by that provision. Such a declaration by Contracting State can be made, changed and withdrawn at any time. See also Article 20 (3-4).

Furthermore, any contracting state may declare that it will apply this Convention only when the states are contracting states, or when parties have agreed that it applies (art. 19 (1)).

The Convention requires that all online companies must have their places of business in different states. However, the term 'place of business' can have different meanings in Internet-based commerce (Malloy September 2004) and its determination is crucial in order to ascertain the place of contract formation, the applicable law and jurisdiction. The Convention defines place of business as "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." (art. 4 (h)) Therefore, the Convention relies on physical address rather than a virtual one. A party's place of business is presumed to be the location indicated by that party, unless another party demonstrates that the indication was incorrect (art. 6). Place of business may also appear from any previous dealings or from information disclosed by the parties. In consequence, the Convention relies on localization data supplied by each party and expressly disregards a place where the technological equipment is located or a place where an information system can be accessed. This is a very important provision that reflects the global consensus with respect to the establishment of merchants' place of business in Internet era.

If a party has not indicated its place of business, or has more than one, then a judge or an arbitrator will select the one, which has the closest relationship to the relevant contract, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract (art. 6 (2)). However, the Convention states that a domain name or electronic mail address connected to a specific country does not create a presumption that a given party has a place of business in that country (art. 6 (5)).

As a result, the Convention is based on two important principles with respect to the ascertainment of parties' place of business. Firstly, it does not matter where the servers are located or what type of domain name is used. The only aspect that is relevant is an actual physical location at which a business is run and which a party should have indicated. Secondly, the Convention is primarily concerned with click-and-mortar companies that pursue both traditional and online outlets. Online players such as Amazon.com are also included because they indicate their place of business. However, the provisions of the Convention would be inapplicable to purely virtual companies that do not have any physical establishment and exist only on the Internet (Polanski 2006; A/CN.9/608/Add.1 para. 75). It is one of the major drawbacks of this Convention.

2.3 Types of transactions covered

Similar to earlier developments in international commercial law, the new Convention is limited to Business-to-Business (B2B) electronic commerce. Consequently, its provisions do not create any rights or obligations for online entrepreneurs with respect to contracts concluded for personal, family or household purposes (art. 2 (1) (a)). Therefore, any contracts concluded between professional party and a consumer (B2C) or between consumers themselves (C2C) or between consumers and professional parties (C2B) are excluded from the scope of the Convention. The reason for an absolute exclusion of consumer contracts is that "consumers could not be expected to check their electronic mails regularly nor be able to distinguish easily between legitimate commercial messages and unsolicited mail." (A/CN.9/608/Add.1 para. 29) This rationale is probably a gross oversimplification as individuals who decide to purchase goods over the Internet are usually well acquainted with the technology and trust the medium. Less educated users lack confidence to buy online. The drafters' reasoning that would be more convincing if it rested on the argument that modern legal systems provide exclusive consumer protection (Quirk and Forder, 2003; Prins, June 2003), which cannot be contracted out. However, some commentators argue that states might exclude this limitation e.g. by means of declarations pursuant to Article 19 (Chong and Chao 2006, para. 45).

The sphere of application of the Convention to professional e-commerce is very broad. It is applicable to transactions of sale and to contracts other than sales such as barters. More importantly, the new Convention also covers transactions in services and information. Previous international trade instruments such as the aforementioned 1980 Vienna Convention on Contracts for the International Sale of Goods was limited only to professional contracts of sale. This is a fundamental and long awaited change. Thanks to this provision - international electronic services have finally been given legal recognition.

However, not all B2B e-commerce transactions are covered as the Convention does not apply to the electronic financial services and international transferable documents such as bills of exchange. Contracts that are generally excluded involve transactions on regulated exchanges, foreign exchange transactions, inter-bank transactions or the use of intermediaries to purchase stocks. For instance, the use of electronic communications in connection with trading on non-regulated stock market between a private investor and his broker is covered by the Convention, while direct online investment on a foreign regulated exchange is not (A/CN.9/608/Add.1, para. 36). It is to be regretted that this instrument excludes such important areas of electronic commerce, as these are the fields that require international regulation.

Furthermore, the Convention provides very flexible rules that permit states and entrepreneurs to modify its provisions. States may individually exclude other types of electronic contracts (art. 19 (2)), for instance those that

create or transfer rights in real estate. Also companies may exclude the application of this Convention or derogate from or vary the effect of any of its provisions (art. 3) subject only to mandatory provisions on e.g. electronic signature.

3. Selected aspects of electronic contracting

The Convention on e-contracting provides answers to important questions that arise in the context of electronic contracting such as whether web-based contracts are valid, whether a website should be regarded as a binding offer or not and what are the consequences of input error. These rules are novel in a sense that earlier international instruments did not address these issues. On the other hand, it also contains several provisions that were influenced by the Model Law on Electronic Commerce and therefore do not require an in-depth analysis.

3.1 Legal recognition of electronic contracting

According to Article 8(2), no party is required to use or accept electronic communications. However, a party's acceptance of an electronic method of communication may be inferred from the party's conduct, for example, handing out a business card with a business email address or accessing someone's website to place an order (A/CN.9/608/Add.2 para. 4).

Having said that, one of the most fundamental provisions of the Treaty are articles 8(1) and 12, which confirm a well established principle of international commercial law that a contract or a communication can be made or evidenced in any particular form: "… a contract shall not be denied validity or enforceability on the sole ground that it is in the form of an electronic communication." (art. 8 (1) and art. 9 (1)) In addition, the Treaty contains a separate provision that expressly recognizes a contract formed by a computer system and a natural person, or by the interaction of automated message systems. Such contract shall not be denied validity or enforceability on the sole ground that no natural person reviewed or intervened in each of the individual actions carried out by the automated message systems or the resulting contract. In consequence, electronic contracts concluded via interactive websites or EDI messages are treated like paper-based contracts. Furthermore, agent-mediated transactions are also given full recognition in international law (Weitzenboeck, 2001).

However, these provisions should not be treated as a rule establishing the absolute validity of electronic communications because there may be reasons that may render the electronic communication invalid (A/CN.9/546, para. 41). In particular, these provisions are not intended to override the form requirements set out in national legal systems. Article 9 specifies the conditions for functional equivalence of electronic writing, signature and originality under national laws based on the 1996 Model Law on Electronic Commerce.

The requirement of writing is met by an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference. In consequence, if terms of an electronic contract are capable of being reproduced and read they would be considered as being written down. The requirement that data be presented in written form is not dependent upon the use of signature and is therefore at the lowest layer in a hierarchy of electronic form.

On the other hand, the requirement of signature is met if a method is used that identifies the party, indicates its intention and is as reliable as appropriate to its purpose (or proven in fact to have fulfilled the above functions). Treatment of electronic signatures differs slightly from the provision contained in UNCITRAL Model Laws as it underlines the intention rather than approval of the content (A/60/17, para. 61). The provision is very general, technology neutral and certainly embraces different types of electronic signatures, such as, signatures based on asymmetric and symmetric cryptography, biometry, tokens, PINs or OK buttons. On the other hand, the signature reliability test ("as reliable as appropriate") cannot be invoked to invalidate the entire contract, if the identity of the signer is unquestionable (A/60/17, para. 65). However, this provision might create uncertainty for merchants because the legal validity of an electronic signature is to be determined by the applicable national law and not by the Convention (A/CN.9/608/Add.2, para. 28). The Convention is only intended to remove obstacles to the use of electronic signatures.

Probably the most challenging issue is the question of which electronic document is original, as legal systems very often require a document to be presented in such form. Since the Convention does not cover negotiable instruments the provision on originality relates to trade documents such as insurance, quality or weight certificates. The requirement of originality is met if the integrity of information is reliably assured from the time when it was first generated in its final form and the information can be displayed to the person requesting it. The integrity of information is assured if it has remained complete and unaltered, apart from any changes that arise in the normal course of electronic data transfer. The standard of reliability shall be assessed in the light of the purpose for which the information was generated and all relevant circumstances. Despite the fact that this formulation sets the mandatory minimum standard for the functional equivalence of an original, it is very unclear as it links the concept of originality to a method of authentication (A/CN.9/608/Add.2, para. 41). It is likely that his provision will be difficult to apply in practice.

3.2 The problem of electronic offer

One of the most controversial and unpredictable issues in electronic commerce is the treatment of a website as a binding offer or non-binding invitation to treat. The proper classification might have serious consequences for an online merchant who can be found bound by his statements made available on a website (Quirk and Forder 2003). Obviously, the problem is related also to other forms of electronic communications such as EDI, but it is most clearly visible in web-based commerce. Therefore, only the latter will be used in the analysis below.

Article 11 contains the following presumption with regards to the status of interactive ordering systems. "A proposal to conclude a contract made through one or more electronic communications which is not addressed to one or more specific parties, but is generally accessible to parties making use of information systems, including proposals that make use of interactive applications for the placement of orders through such information systems, is to be considered as an invitation to make offers, unless it clearly indicates the intention of the party making the proposal to be bound in case of acceptance."

The reading of the article suggests that as a rule of thumb, web-based sellers should be treated as presenting non-binding statements of intentions to enter into contractual arrangements. There are two conditions, however. Firstly, they should not address electronic communications to one or more specific persons. Secondly, they should not clearly indicate the intention to be bound in case of acceptance.

With respect to the first requirement, it is clearly fulfilled by the vast majority of websites. It is rarely, if ever, the case that a website is addressed to a specific person. This could only happen if a given website uses cookies that identify the user, but even then, the situation is very unclear. Furthermore, all static websites fall into this category as they, by definition, are not intended to be interactive.

Nevertheless, a large number of modern, interactive online websites (e.g. e-shops) could fulfil the first requirement. It is argued that the drafters failed to notice that many websites require a prior registration. After a customer logs into such an interactive ordering system, the proposal is always specifically addressed to him or her. The validity of this claim can be easily ascertained if a system has implemented shopping cart technology.

However, even if a proposal is addressed to a specific person it still has to fulfil the second condition, i.e. it must clearly indicate the intention of the party making the proposal to be bound in case of acceptance. Such intention can be induced from various indicators such as buttons or product descriptions. The practice shows that more advanced websites, particularly those that employ shopping cart technology, usually provide a clear description of a sequence of steps that follow to conclude a contract (this practice is also referred to in art. 10 of the Directive on electronic commerce). Such visual clues are very strong evidence of the clear intention of the seller.

Clearly, the provision of Article 11 is not a very fortunate one. It fails to take into account the fact that registration that is required by nearly all more sophisticated commercial websites can be regarded as a communication addressed to a specific person. Furthermore, it does not even define what constitutes an invitation to treat and how it is to be distinguished from the offer. Finally, it uses the confusing term "interactive applications for the placement of orders" rather than "automated message system" used elsewhere in the text, which might lead to future unnecessary problems with interpretation.

Therefore, as a rule of thumb, websites should be regarded as invitations to treat, unless they require prior registration. In such case scenario one must check if a proposal is clear and definite. If it is, the proposal should be treated as an offer from the moment of successful registration.

3.3 Time and place of contract formation

The Convention lacks a specific provision on the time and place of contract formation, because such rule could be inconsistent with a law on contract formation applicable to any given contract. This approach introduces an uncertainty because the time and place of contract formation have to be determined by an applicable national law established by the rules of private international law of the forum state. Similarly, the effectiveness of an illegible communication and its binding character is to be determined by national laws (A/CN.9/608/Add.2, para.48). However, the Treaty contains provisions on time and place of dispatch and receipt of electronic communications, which offer some guidance in this respect. These rules are largely based on the Model Law on Electronic Commerce.

As a rule of thumb, a place of business designates the place where the information was dispatched or received (art. 10 (3)), even if supporting information system is located elsewhere. As it was discussed earlier, the place of business is presumed to be located at a place indicated by a merchant (art. 6). This provision reflects the principle of irrelevancy of location of information systems. However, still unresolved is the question of place in the context of electronic messages sent or received by virtual companies.

On the other hand, the time of dispatch is the time when a message leaves the computer system of an originator (art. 10 (1)). In case where an electronic communication is exchanged through the same information system, the time of dispatch is the time of receipt.

The time of receipt in turn, is the time when it becomes capable of being retrieved by the addressee at a designated electronic address. The message is presumed to be capable of being retrieved when it reaches the addressee's designated electronic address. The correct electronic address is important, because the time of receipt at another address is when the addressee becomes aware that a message has been sent and that it can be retrieved. The aforementioned provision recognizes the customary use of firewalls, which might prevent the communication from reaching the addressee. Furthermore, it does not run counter to a trade usage, under which "certain encoded messages are deemed to be received even before they are usable by, or intelligible for, the addressee." (A/CN.9/608/Add.2, para. 54) In general, however, it is well suited to email and EDI-based electronic commerce. The ascertainment of time may not be so easy in case of web-based commerce, because such information would usually be recorded only by one information system.

3.4 Electronic mistake

One of the most cumbersome issues discussed in the legal literature with respect to electronic contracting is treatment of mistake. Since the electronic communication takes place often with or between pre-programmed devices, very rapidly and at a distance, mistakes might be difficult to notice and correct. The Treaty regulates consequences of a contractual mistake in the following manner:

> "Article 14. Where a person makes an input error on an interactive website and is not given the opportunity to correct it, he or she has the right to withdraw the portion of the electronic communication if he or she:
> (a) (…) notifies the other party of the error as soon as possible; and
> (b) (…) has not used or received any material benefit or value from the goods or services, if any, received from the other party."

Firstly, the treatment of electronic mistake is expressis verbis limited to transactions concluded via interactive websites. It means that non-interactive or passive websites, email, chat or EDI are excluded. Such approach is reasonable because the real danger of making mistake involves websites that permit immediate conclusion of a contract. However, technologies such as EDI also enable automatic, between-computers contracting.

Secondly, electronic mistake can only be made by a person. It is clear from this wording that errors made by pre-programmed devices cannot be corrected in this manner.

Thirdly, this regulation benefits only buyers rather than sellers, or active persons rather than pre-programmed commercial professionals. In other words, entrepreneurs cannot invoke this provision to justify their unwillingness to honour the contract. This is highly problematic because the most famous examples of electronic mistakes such as selling TV for price ten times less than that offered by competitors (Out-Law.com 21May 2004) involve the seller rather than the buyer.

Fourthly, there are two conditions for the exercise of this right. A person must promptly notify the other party. However, the second condition for the exercise of the right of withdrawal is that he or she has not benefited from the transaction by e.g. downloading a piece of software from a website and then trying to return it. One should also stress that no time limit was set for the exercise of the right of withdrawal, thereby introducing legal uncertainty.

The regulation of input error spurred a great deal of controversy. Critics argued that such provision might conflict with well-established contract law principles, is more appropriate for consumer transactions and that it would create serious difficulties for trial courts, since the only evidence of the error would be the assertion of the interested party that he or she made an error. The proponents argued that the type of error is specific to electronic communication and therefore deserves special treatment, that it provides a much needed uniform rule in view of the differing and possibly conflicting national rules and that it did not in any way aggravate the evidentiary difficulties that already exist in a paper-based environment, because the courts would have to assess all the circumstances anyway. The proponents won, but the discussions will probably continue.

In summary, the Convention regulates the question of who should bear the risk of input error in electronic communication. However, it only provides for consequences of input error. It does not oblige online entrepreneurs to introduce methods of error identification and correction, despite the fact that numerous trade usages have emerged in this regard (Polanski 6-8 June 2005). The drafters felt that such a prescriptive provision would be incompatible with "the enabling nature" of the Convention. In consequence, online entrepreneurs should rely on well-established trade customs in this area that serve the purpose of identifying and correcting input errors.

3.5 Interpretation of the Convention

According to Article 5, the provisions of the Convention should be interpreted having regard to its international character and the need to promote uniformity and the observance of good faith in international trade. On the other hand, gaps are to be settled in conformity with the general principles on which it is based such as the principles of functional equivalence and technological neutrality, expressly referred to in the Preamble. Only in the absence of such principles, questions not expressly settled in the Convention should be answered by the applicable law of a given state.

This regulation of interpretation of the Convention reflects the autonomous character of the Convention. It should be interpreted according to the principles on which it is based in order to avoid the application of public international law on the interpretation of the treaties (art. 31-33 of the Vienna Convention on Treaties), which is not suitable for private law provisions (A/CN.9/608/Add.1 para. 64). Only when the application of such principles turns out to be impossible to apply, the Convention resorts to a law of a given national state.

However, the autonomous character of the Convention is adversely affected by lack of explicit recognition of binding character of trade usages akin to the formulation found in Article 9 of the Vienna Sale of Goods Convention (Bianca and Bonell 1987). It is impossible to understand why UNCITRAL experts did not recognize the importance of trade usages in electronic commerce. It is so despite the fact that the drafters were aware of some trade usages (e.g. the recognition of receipt of certain encoded messages). Such an approach is deeply flawed as it ignores probably the most powerful source of norms in global electronic commerce.

4. Assessment of the Convention

The new Convention is certainly the most important international development in the field of electronic commerce law, which can bring more predictability to international trade. The most important advantage of the new Convention is that it modernizes the terminology of older conventions to embrace the impact of digital technologies. Being primarily concern with the formation of electronic contracts, it recognizes the legal value of electronic communications and online contracts, which are given the same weight as paper-based ones.

Another advantage of the Convention is its broad scope of application as it goes beyond sale of goods and covers electronic trade in services and information. None of the earlier acts had such a broad sphere of application. Furthermore, the new Convention also confirms widely recognized principles such as that of technological neutrality, functional equivalency or irrelevancy of the location of information systems.

The Treaty increases the certainty of electronic contracting by expressly recognizing the validity of Internet transactions. One might argue that it attaches special importance to automated message systems such as online marketplaces, interactive electronic shops or EDI. The Convention also removes the barrier to electronic commerce by specifying the requirements for the recognition of electronic writing, signature and original.

Commercial predictability of electronic transactions is further increased by the regulation of input error. Furthermore, the Convention enhances legal certainty of online contracts by creating a presumption as to the non-binding character of web-based catalogues. Finally it offers a useful definition of parties' place of business and specifies time and place of electronic communication.

However, the new Treaty also has some shortcomings. The conventional norms are often vague, unclear and can be difficult to read and apply by an average online merchant. For instance, Article 8 on the recognition of electronic communications and Article 9 on the form requirements can be misinterpreted to allow for any technology to be used to conclude a contract. Unfortunately, the national laws and not the Convention will have a final say whether an electronic communication is, in fact, valid.

Furthermore, it is not a very innovative instrument as it repeats many of the provisions found in earlier documents and does not deal with many substantive issues that are left for national legislators to enact. For instance, Article 10 contains elaborate rules on time and place of electronic communications but establishes no rules on time and place of contract formation.

In addition, having broader scope than traditional commercial conventions it nevertheless excludes fundamental areas of e-commerce such as B2C trade or financial transactions where uniform, international regulation is really necessary due to the popularity of online banking and Internet-mediated investments. Moreover, the Convention does not apply to purely virtual companies that do not have place of business and therefore ignores one of the key elements of modern international electronic commerce.

Flexibility of e-contracting is seriously undermined by the lack of recognition of electronic trade usages that have emerged in electronic commerce, particularly in online security and online contracting. In fact, the drafters have openly expressed their resentment towards lex mercatoria of Internet community. It is visible in Article 7 on the provision of information requirements and in Article 13 on the availability of contract terms, which are not only superfluous but also unnecessarily restrict the interpretation of the expression “rule of law” to laws that have become part of the law of the state. Such an approach ignores the most promising source of norms and does not seem to take into account the values of Internet community enshrined in its practices.

Finally, the United Nations failed to realize the value of public consultations with the Internet community. Only states and interested international organizations were invited to participate in the preparation of the draft Convention at all the sessions of the Working Group IV with a full opportunity to speak and make proposals. The fact that the Internet users could not participate in the drafting process and express its opinions on UNCITRAL's website is against the spirit and the fundamental value of the Internet community, which continues to be developed through open sharing of information. Global Internet regulations should at least be consulted with the users.

Despite its shortcomings, the UN Convention on the Use of Electronic Communications in Electronic Contracts represents a major step forward in the international regulation of electronic commerce. It should further enhance confidence and trust in electronic commerce in international trade. Furthermore, it could also serve as a useful basis to national legislators to simplify and enhance various domestic rules that applied to electronic commerce. Therefore, it is advisable for all states to ratify this Convention without reservations in order to bring more certainty and predictability to modern Internet-based trade.

REFERENCES

1. Audit, B. (1998). The Vienna Sales Convention and Lex Mercatoria. Lex Mercatoria and Arbitration: A Discussion of the New Law Merchant. T. E. Carbonneau. Dobbs Ferry, N.Y., Juris Publishing: 173-195.
2. Bianca, C. M. and M. J. Bonell (1987). Commentary on the International Sales Law: The 1980 Vienna Sales Convention. Giuffrè, Millan.
3. Boersma, M. (1998). "International business transactions, the Internet and the Convention on the International Sale of Goods: Preventing unintentional pitfalls." Journal of International Law and Practice 7: 107.
4. Chong, K. W. and S. J. Chao (2006). "United Nations Convention on the Use of Electronic Communications in International Contracts - A New Global Standard." Singapore Academy of Law Journal 18: 116-202.
5. Connolly, C. and P. Ravindra (2006). "First UN Convention on eCommerce finalised." Computer Law & Security Report 22: 31 – 38.
6. Council of Europe (23 November 2001) Convention on Cybercrime, ETS no.: 185, signed at Budapest, Available at: http://conventions.coe.int/Treaty/en/Treaties/Html/185.htm, Accessed: 7/08/2006.
7. Eiselen, S. (1999). "Electronic Commerce and the UN Convention on Contracts for the International Sale of Goods (CISG) 1980." The EDI Law Review 6(1): 21-46.
8. Malloy, M. P. (September 2004). "e-Banking - Law struggles to keep up with the virtual world." The European Lawyer.
9. Out-Law.com (21May 2004) Web pricing error is a question of degree in France, Available at: http://www.out-law.com/php/page.php?page_id=webpricingerroris1085134291&area=news, Accessed: 24/05/2004.
10. Polanski, P. P. (5-7 June 2006). Convention on e-contracting: the rise of international law of electronic commerce? Proceedings of the 19th Bled eCommerce Conference "eValues", Bled, Slovenia.
11. Polanski, P. P. (6-8 June 2005). Common practices in the electronic commerce and their legal significance. Proceedings of the 18th Bled eCommerce Conference "eIntegration in Action", Bled, Slovenia.
12. Polanski, P. P. (2006). Some remarks on the scope of application of the newest Convention on electronic communications. e-Staat un e-Wirtschaft aus rechtlicher Sicht. Tagungsband des 9. Internationalen Rechtsinformatik Symposions IRIS 2006. E. Schweighofer, D. Liebvald, M. Drachsler and A. Geist. Stuttgart, Boorberg: 426-433.
13. Prins, J. E. J. (June 2003). "Consumers, Liability, and the Online World." Information & Communication Technology Law 12(2): 143-164.
14. Quirk, P. and J. Forder (2003). Electronic commerce and the law. Singapore, John Wiley & Sons Australia, Ltd.
15. UNCITRAL (11- 22 October 2004) A/CN.9/571 - Report of the Working Group on Electronic Commerce on the work of its forty-fourth session, Available at: http://daccessdds.un.org/doc/UNDOC/GEN/V04/589/92/PDF/V0458992.pdf?OpenElement, Accessed: 1/02/2006.
16. UNCITRAL (4-15 July 2005) A/60/17 - Report of the United Nations Commission on International Trade Law on the work of its thirty-eighth session.
17. UNCITRAL (17 March 2006) A/CN.9/608 Legal aspects of electronic commerce. Explanatory note on the Convention on the Use of Electronic Communications in International Contracts.
18. UNCITRAL (22 March 2006) A/CN.9/608/Add.1 Legal aspects of electronic commerce. Explanatory note on the Convention on the Use of Electronic Communications in International Contracts.
19. UNCITRAL (22 March 2006) A/CN.9/608/Add.2 Legal aspects of electronic commerce. Explanatory note on the Convention on the Use of Electronic Communications in International Contracts.

20. UNCITRAL (1980) United Nations Convention on Contracts for the International Sale of Goods, Available at: http://www.uncitral.org/english/texts/sales/CISG.htm, Accessed: 24/08/2002.
21. United Nations (23 November 2005) United Nations Convention on the Use of Electronic Communications in International Contracts, Available at: http://www.uncitral.org/pdf/english/texts/electcom/2005Convention.pdf, Accessed: 7/8/2006.
22. Weitzenboeck, E. M. (2001). "Electronic Agents and the Formation of Contracts." International Journal of Law and Information Technology 9(3): 204-234.