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MEMORANDUM

2005-2006

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From: American Bar Association Section of Science & Technology Law
American Bar Association Section Business Law
American Bar Association Section International Law

Date: June 8, 2006

Re: **Comments for U.S. Department of State Regarding the United Nations Convention on the Use of Electronic Communications in International Contracts**

The American Bar Association Sections of Science & Technology Law, Business Law, and International Law (collectively the "ABA Sections") are pleased to submit the following comments to the U.S. Department of State in connection with its deliberations regarding whether the United States should become a signatory to the *United Nations Convention on the Use of Electronic Communications in International Contracts* (the "E-Contracting Convention" or "Convention").¹

These views are being presented on behalf of the ABA Sections only and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as necessarily representing the position of the American Bar Association.

The ABA Sections submit these comments in support of their recommendation that the United States become a signatory² to the E-Contracting Convention. We also note that a signing ceremony will take place at the U.N. on July 6, 2006 during UNCITRAL's thirty-ninth session, to promote participation in the Convention by States and awareness of its provisions. Accordingly, we recommend that the U.S. sign the E-Contracting Convention at this time, but we do not express any view on ratification in this document.

¹ A copy of the Convention is available at www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention.html.

² A treaty does not enter into force between states until it has been ratified by the states concerned. Most treaties provide for signature as a step before ratification to signal a state's basic support and intention to consider ratification to bring it into force. Signature alone, however, does not impose on the signing state any obligations under a treaty. Ratification is the act whereby the state establishes its consent to be bound by a treaty. Thus, we note that by signing the Convention the U.S. does not consent to be bound by it. That occurs at a later date, if and when the U.S. ratifies the Convention. By signing the Convention the U.S. merely obligates itself, in good faith, to consider ratification and to refrain from acts that would defeat the object and purpose of the treaty.

Following signature of the Convention by the U.S., the ABA Sections will undertake to provide a detailed evaluation of the Convention, and its potential impact on international law and treaties, in order to assist the State Department in the analysis required for a recommendation regarding possible ratification at a future date.

The ABA Policy on which these comments are based is Resolution 114 adopted by the ABA House of Delegates in August 1997. That Resolution “encourage[d] the private sector, governments, and international organizations to cooperate to establish a legal framework within which global electronic commerce can flourish in an environment that provides appropriate legal protection to all interested parties, while eliminating unnecessary legal and functional barriers to electronic commerce.”⁴

Background

A. The ABA Sections

(1) ABA Section of Science & Technology Law

The mission of the ABA Section of Science & Technology Law is “to provide leadership on issues concerning science and technology and the law.” To that end, since 1992 the Section has been actively involved in examining the legal and technical issues raised by the use of electronic communications for commercial purposes, and in developing e-commerce legal and public policy. In connection with this work the Section has established and maintained active liaison and cooperation with technological experts, and through that process sought to develop a clear understanding of the electronic communications issues resulting from the intersection of the law and technology.

The ABA Section of Science & Technology Law has actively participated in the development of the Uniform Electronic Transactions Act (UETA), the UNCITRAL Model Law on Electronic Commerce, the UNCITRAL Model Law on Electronic Signatures, and several other e-commerce legislative efforts in the U.S. and internationally. It has also been a full participant in negotiation of the E-Contracting Convention since work began in 2002. Members of the Section have served on the U.S., ABA, and World Bank Delegations to UNCITRAL, have extensively reviewed and commented on draft provisions of the Convention during the negotiation process, and held substantial discussions with many stakeholders to obtain their input throughout the course of the deliberations.

⁴ See ABA Resolution No. 114, adopted by the ABA House of Delegates at its meeting on August 5-6, 1997.

(2) **ABA Section of Business Law**

The ABA Section of Business Law serves the public, the profession and its nearly 60,000 members by furthering the development and improvement of business law, educating Section members in business law and related professional responsibilities, and helping Section members serve their clients competently, efficiently, and professionally. The Section, through its committees, often provides comment on policy to Congress and government agencies.

The Section's Cyberspace Law Committee has actively followed development of the E-Contracting Convention. Mr. Harold Burman, a lawyer with the U.S. State Department, serves as Chair of the Committee's Working Group on International Policy, and that capacity, Mr. Burman has led numerous Working Group discussions about the E-Contracting Convention. The dialogue among Committee members has thus made valuable contributions to the drafting process and provided Section members insight about international developments affecting business law.

Cyberspace Committee members have served as members of the U.S. Delegation to UNCITRAL. In addition, regular participants in Working Group discussion include key players in the drafting of the Uniform Electronic Transactions Act ("UETA"), the uniform law that provides the framework for e-contracting in U.S. states. As a result, Working Group members are well-versed in the subject matter of the E-Contracting Convention.

(3) **ABA Section of International Law**

The ABA Section of International Law ("ABA International") is a leader in the development of policy in the international arena, the promotion of the rule of law and the education of international law practitioners. It is the only ABA entity that focuses on the full range of international legal issues and is involved in a wide variety of substantive legal activities.

The Information Services, Technology and Data Protection Committee of ABA International identifies critical substantive international legal issues in electronic commerce and facilitates ABA International's consideration of these issues. It advises ABA International leadership on structural and other changes that may be needed to ensure coverage of these issues, facilitates coordination of committee programs and other activities on e-commerce and privacy issues and serves as ABA International's focal point for contacts with other ABA sections and U.S. and international organizations actively involved in e-commerce and privacy issues.

B. The E-Contracting Convention

(1) **History**

The United Nations Commission on International Trade Law (UNCITRAL), through its Working Group on Electronic Commerce, developed the E-

Contracting Convention over a three-year period beginning in 2002. The E-Contracting Convention was adopted by UNCITRAL at the thirty-eighth Session of the Commission in July 2005. Thereafter, it was adopted by the U.N. General Assembly on November 23, 2005.⁵ The E-Contracting Convention is now open for signature by all countries at United Nations Headquarters in New York, and will remain open for signature until January 16, 2008.

The E-Contracting Convention complements and builds upon earlier instruments prepared by UNCITRAL, including the UNCITRAL Model Law on Electronic Commerce.⁶ The U.S. played an active role in the development of the Convention, and the final product is consistent with existing U.S. e-commerce law and policy.

(2) Summary of the E-Contracting Convention

The E-Contracting Convention is intended to remove obstacles to the use of electronic communications in international contracting, including obstacles that might arise from differing country-specific approaches to e-commerce, and obstacles arising under existing international trade law instruments, most of which were negotiated long before the development of electronic commerce technology. As such, it is designed to be “enabling” rather than “regulatory,” and does not alter the fundamental rules of contract law.⁷

The E-Contracting Convention applies only to business-to-business transactions⁷ in international commerce. The Convention adopts a non-regulatory approach designed to remove barriers and provide legal certainty to those engaged in international electronic transactions, in much the same way that E-SIGN and UETA do for U.S. domestic e-commerce transactions.⁸ It addresses six (6) fundamental e-commerce legal issues:

1. Legal Recognition of E-Commerce. The Convention provides for the legal recognition of electronic communications, by establishing that an electronic communication or contract cannot be denied validity or enforceability on the sole ground that it is in an electronic form.⁹
2. Elimination of Legal Barriers to E-Commerce. The Convention eliminates the primary legal barriers to e-commerce by:¹⁰

⁵ See UN Press release at <http://www.un.org/News/Press/docs/2005/ga10424.doc.htm>.

⁶ See United Nations, UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996, available at www.uncitral.org/english/texts/electcom/ecommerceindex.htm

⁷ Consumer contracts are excluded. See E-Contracting Convention, Article 2(1)(a).

⁸ See Appendix A for a comparison of the primary provisions of the E-Contracting Convention with corresponding provisions in U.S. domestic law as embodied in E-SIGN and UETA.

⁹ E-Contracting Convention, Article 8.

¹⁰ E-Contracting Convention, Article 9.

- (a) Recognizing that electronic records satisfy statutory writing requirements;
 - (b) Recognizing that electronic signatures satisfy statutory signing requirements;
 - (c) Defining the criteria for acceptable electronic signatures; and
 - (d) Recognizing that electronic records satisfy evidentiary requirements for originality.
3. Preserves Freedom of Contract. The Convention embraces the fundamental principle of freedom of contract, and allows the parties to an international electronic transaction to exclude the application of the Convention or derogate from or vary the effect of any of its provisions.¹¹
 4. Default Rules for Electronic Communications. The Convention provides default rules defining the time and place of sending and receipt of electronic communications.¹² In addition, the receipt rule creates only a rebuttable presumption of receipt, allowing, for example, a defense based on deployment of security methods (e.g., spam and virus filters, etc.), a result sought by the US and confirmed in the official commentary.
 5. Recognition of Automated Contracts. The Convention recognizes that enforceable contracts can be created by automated computer processes, such as so-called electronic agents.¹³
 6. Default Rules for Human Input Errors in Electronic Communications. The Convention provides default rules for addressing keyboard entry errors made by persons engaging in electronic transactions with the automated system of another party that does not provide an opportunity for error correction.¹⁴

Discussion

1. **The E-Contracting Convention will provide a harmonized global legal framework for e-commerce consistent with existing U.S. e-commerce law and policy**

The E-Contracting Convention addresses the validity of e-commerce transactions in international commerce. This is the most basic and fundamental issue to be addressed by e-commerce legislation. Moreover, it is the subject that has seen the most activity in jurisdictions around the world. Yet a review of the electronic transaction legislation currently enacted or under consideration in many countries reveals that while there is agreement on where we ultimately want to go (facilitating e-commerce), there has been a divergence of approach regarding how to get there.

¹¹ E-Contracting Convention, Article 3.

¹² E-Contracting Convention, Article 10.

¹³ E-Contracting Convention, Article 12.

¹⁴ E-Contracting Convention, Article 14.

Country legislation ranges from a minimalist approach that simply authorizes the use of electronic signatures in very limited circumstances, to legislation that establishes a very formal and highly regulatory approach governing the manner in which electronic transactions and signatures may be used and e-businesses may operate. Moreover, many developing countries have yet to enact any legislation. The net result has been a variety of different rules (or an absence of rules) governing global electronic commerce. For those engaging in international e-commerce, the resulting environment is problematic at best.

This situation is further complicated by concerns regarding obstacles that might arise under existing international trade law instruments that were negotiated long before the development and widespread use of electronic commerce technology such as e-mail, electronic data interchange, and the Internet. The legal uncertainty regarding barriers to e-commerce that might arise from such international treaties needs to be addressed in the context of cross-border commerce much the same as concerns regarding barriers to e-commerce arising from pre-existing U.S. state and federal laws needed to be addressed by the enactment of E-SIGN and UETA.¹⁵

The E-Contracting Convention will significantly reduce the legal uncertainty resulting from the lack of (or inconsistent) country legislation addressing e-commerce transactions, and from legal barriers created by pre-existing international treaties, by harmonizing the fundamental law governing the enforceability of e-commerce transactions in cross-border commerce. This will provide uniformity and predictability in the law enabling international electronic transactions. Moreover, the provisions of the Convention are consistent with U.S. e-commerce law and policy, incorporating principles of freedom of contract and technological neutrality as well as a primary focus on removing legal barriers to e-commerce rather than regulating e-commerce.¹⁶

For the past decade, the U.S. government has maintained a consistent view that the global information infrastructure “has the potential to revolutionize commerce . . . by dramatically lowering transaction costs and facilitating new types of commercial transactions.”¹⁷ To encourage electronic commerce, the U.S. government in 1997 adopted a policy that supported “the development of both a domestic and global uniform

¹⁵ In the case of E-SIGN and UETA, certain statutes were excluded from the scope of coverage in cases where the general enablement of e-commerce appeared to conflict with the interests addressed by the statute. Likewise, the Section recognizes that there may be some international treaties where application of the enabling provisions of the E-Contracting Convention might be inappropriate. Accordingly, the Section is willing to assist the State Department to assess the impact of the E-Contracting Convention on existing treaties and to identify any treaties that the U.S. may want to exclude from the application of the Convention.

¹⁶ See Appendix A for a comparison of the primary provisions of the E-Contracting Convention with corresponding provisions in U.S. domestic law as embodied in E-SIGN and UETA.

¹⁷ A Framework for Global Electronic Commerce (July 1, 1997), available at www.technology.gov/digeconomy/framework.htm

commercial legal framework that recognizes, facilitates, and enforces electronic transactions worldwide.”¹⁸ The focus has been on technology neutrality and a non-regulatory approach designed to encourage the experimentation and innovation necessary for this new mode of doing business to flourish.

Likewise, at about the same time, the ABA House of Delegates supported this policy by adopting a resolution that “encourage[d] the private sector, governments, and international organizations to cooperate to establish a legal framework within which global electronic commerce can flourish in an environment that provides appropriate legal protection to all interested parties, while eliminating unnecessary legal and functional barriers to electronic commerce.”¹⁹

At the domestic level, that U.S. policy framework took the form of the federal Electronic Signatures in Global and National Commerce Act (“E-SIGN”)²⁰ enacted in 2000, and the Uniform Electronic Transactions Act (“UETA”)²¹ approved in 1999 and now enacted in 46 states. The framework embodied in E-SIGN and UETA has worked well in the U.S., facilitating the development of a robust electronic commerce environment. Moreover, both E-SIGN and UETA are fundamentally well-understood by businesses, and have been embraced as an appropriate non-regulatory approach that allows and encourages experimentation, development, and expansion of e-commerce.

The E-Contracting Convention now offers the opportunity to achieve the same objectives in a global environment. The E-Contracting Convention addresses and harmonizes the most basic of e-commerce legal issues – e.g., the question of the validity of electronic transactions. This includes clarifying that electronic records and electronic signatures satisfy legal formalities (e.g., the writing and signature requirements imposed by a variety of statutes and regulations), that records can be maintained solely in an electronic form, that an electronic record constitutes an “original” for evidentiary purposes,²² and that electronic records and electronic signatures will not be denied admissibility solely because of their electronic form.

¹⁸ *Id.*

¹⁹ See ABA Resolution No.114, adopted by the ABA House of Delegates at its meeting on August 5-6, 1997.

²⁰ Electronic Signatures in Global and National Commerce Act (E-SIGN), Pub. Law 106-229, 15 U.S.C. 7001 *et. seq.*, effective October 1, 2000. E-SIGN is available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_cong_bills&docid=f:s761enr.txt.pdf.

²¹ Uniform Electronic Transactions Act (UETA), approved by the National Conference of Commissioners on Uniform State Laws (NCCUSL) on July 23, 1999. A copy of UETA is available at www.law.upenn.edu/bll/ulc/fnact99/1990s/ueta99.htm.

²² Negotiable instruments, such as bills of exchange, promissory notes, consignment notes, bills of lading, warehouse receipts or other transferable documents or instruments that entitle the bearer or beneficiary to claim the delivery of goods or the payment of a sum of money are excluded from the scope of the Convention. See Article 2(2).

By providing an international legal framework to address these issues and harmonize the legal approach, the E-Contracting Convention will remove significant legal barriers to international electronic commerce. At the same time, it will significantly reduce the legal uncertainty regarding differing country laws that currently confronts businesses doing cross-border electronic transactions, thereby contributing to the predictability and uniformity necessary to support cross-border commerce.

2. The E-Contracting Convention will significantly help to promote and facilitate international commercial transactions involving U.S. businesses

Providing a harmonized global legal framework that enables, but does not regulate, e-commerce will provide significant assistance to U.S. businesses seeking to expand internationally, or seeking to reduce costs and increase efficiencies in existing international commerce and in their global supply chain networks. Moreover, because the Convention is consistent with existing U.S. e-commerce law and policy, it will help to promote U.S. e-commerce objectives and to simplify the task of U.S. businesses in addressing the legal issues involved in electronic international transactions.

In addition to the legal certainty and predictability that will flow from widespread adoption of the E-Contracting Convention, it offers U.S. companies an additional advantage. It adopts a model similar to that which they are already familiar with, and have effectively used in U.S. domestic transactions for the past several years. This will provide a familiar and predictable legal framework, even for transactions not governed by U.S. law. To the extent it is widely adopted, it will provide for businesses an internationally endorsed alternative to other country and regional rules of a more regulatory nature.

While U.S. companies can try to address these issues by specifying that U.S. law applies to their transactions, and that U.S. courts will have exclusive jurisdiction of any disputes, it is not clear that they will always have the bargaining power to achieve this result, or that it will be enforceable in all cases or venues. Moreover, many businesses, such as small and medium-sized enterprises (SMEs) may not have the resources or expertise to correctly address these issues by contract.

Thus, the default enabling rules provided by the E-Contracting Convention will provide a safety valve to help ensure enforceability and predictability in international e-commerce transactions, even where the parties' contracts do not address the issue. This can also extend market growth opportunities for U.S. businesses, particularly SMEs, by enabling them to undertake international business opportunities with more certainty and less cost. Because of the international uniformity and legal predictability that will result from widespread ratification of the E-Contracting Convention, and the fact that it adopts a model familiar to U.S. companies, the cost and uncertainty of international electronic transactions will be significantly reduced for U.S. companies.

3. U.S. support for the E-Contracting Convention is also important for the international community

In 1998, the United States recommended that UNCITRAL develop an international convention on electronic commerce based on preexisting principles of the UNCITRAL Model Law on Electronic Commerce (MLEC).²³ These principles include technological neutrality, national source neutrality, and party autonomy in the choice of applicable contract law and rules. In July 2001, UNCITRAL endorsed this idea with a recommendation by its Working Group on Electronic Commerce to prepare an international instrument dealing with selected issues of electronic contracting, and to examine possible legal barriers to electronic commerce in existing international conventions.²⁴ Since then, the U.S. has been instrumental in developing and shaping the direction of the Convention. The final product is consistent with existing U.S. e-commerce law and policy.

As a consequence, regardless of whether the U.S. ultimately ratifies the Convention, the expression of support that will be provided by signing the Convention is critical to maintaining U.S. leadership and credibility on these issues. Specifically, signature by the U.S. will:

- Help to encourage other countries to sign and ratify the Convention, thereby helping to create an international legal environment designed to facilitate e-commerce, and to do so using a non-regulatory approach that (i) will strongly support the growth and development of international trade, and (ii) is consistent with U.S. law and policy
- Encourage and facilitate developing countries (that do not yet have a defined legal infrastructure for e-commerce) to enact e-transaction laws that are harmonized with the general international principles embodied in the Convention, and also consistent with U.S. e-commerce policy; and
- Assist developing countries in implementing a legal framework for e-commerce that will enhance their ability to engage in global trade and commerce.

U.S. recognition of, and support for, the fundamental enabling and non-regulatory principles embodied in the Convention is key to facilitating a global commercial environment friendly to e-commerce. It not only significantly reduces concerns over potentially conflicting rules in countries that have taken an alternate approach to e-commerce, but it also provides uniform rules for those countries that have yet to adopt substantive e-commerce legislation.

Accordingly, the ABA Sections strongly urge the U.S. government to sign the E-Contracting Convention.

²³ UNCITRAL, Working Group on Electronic Commerce, Note by the Secretariat, Proposal by the United States of America, U.N. Doc. A/CN.9/WG.IV/WP.77 (May 25, 1998), available at www.uncitral.org/pdf/english/workinggroups/wg_ec/wp-77.pdf.

²⁴ UNCITRAL, Report of the Working Group on Electronic Commerce on the Work of its Forty-Fourth Session, P 1, U.N. Doc. A/CN.9/571 (Nov. 8, 2004)

Appendix A

Comparison of Fundamental Provisions of the E-Contracting Convention with U.S. Domestic Law as Embodied in E-SIGN and UETA

Most of the principles and legal rules embodied in the E-Contracting Convention are similarly reflected in the primary U.S. e-commerce legislation (E-SIGN and UETA). The relationship between the E-Contracting Convention and U.S. law embodied in E-SIGN and UETA can be summarized as follows:

1. Legal Recognition of E-Commerce. The E-Contracting Convention provision regarding the legal recognition of electronic communications is almost verbatim the same as that in E-SIGN and UETA.²⁵
2. Elimination of Legal Barriers to E-Commerce. The E-Contracting Convention adopts the same basic approach to eliminating legal barriers to e-commerce as that found in E-SIGN and UETA. Specifically, both the E-Contracting Convention and E-SIGN and UETA:
 - (a) recognize that electronic records satisfy writing requirements.²⁶
 - (b) recognize that electronic signatures satisfy signing requirements;²⁷ and
 - (c) recognize that, for evidentiary requirements, electronic records satisfy originality requirements.²⁸

Moreover, while the definition of electronic signature in the E-Contracting Convention is stated differently than that in E-SIGN and UETA, it seems clear that all forms of electronic signature recognized by E-SIGN and UETA are also recognized by the Convention.²⁹

²⁵ Compare E-Contracting Convention Article 8 with E-SIGN at 15 U.S.C. 7001(a), and UETA Section 7.

²⁶ Compare E-Contracting Convention Article 9(2) with E-SIGN at 15 U.S.C. 7001(a), and UETA Section 7(c).

²⁷ Compare E-Contracting Convention Article 9(3) with E-SIGN at 15 U.S.C. 7001(a), and UETA Section 7(d).

²⁸ Compare E-Contracting Convention Article 9(4) with E-SIGN at 15 U.S.C. 7001(d), and UETA Section 12. Note that the E-Contracting Convention does exclude negotiable instruments. See Article 2(2).

²⁹ The E-Contracting Convention Article 9(3), requires use of a “method” that identifies the signer, indicates the signer’s intent, and is either (i) sufficiently reliable for the circumstances, or (ii) together with other evidence can be proven to identify the signer and indicate the signer’s intent. Similarly, E-SIGN at 15 U.S.C. 7006(5), and UETA Section 2(8) define electronic signature to be a “sound, symbol, or process” that is attached to the record being signed, and that indicate the signer’s intent. While technically not requiring that such signatures identify the signer, plaintiff’s in the U.S. will presumably not be able to enforce a signature against a party unless they are able to identify that such party executed or adopted th signature.

3. Preserves Freedom of Contract. The E-Contracting Convention, like UETA, embraces the fundamental principle of freedom of contract, and allows the parties to an electronic transaction to vary the effect of any provisions in the Convention.³⁰
4. Default Rules for Electronic Communications. The default rules defining the time and place of sending and receipt of electronic communications in the E-Contracting Convention are very similar to the rules in UETA (E-SIGN does not address this issue). In addition, the receipt rule creates only a rebuttable presumption of receipt, allowing, for example, a defense based on deployment of security methods (e.g., spam and virus filters, etc.), a result sought by the US and confirmed in the official commentary. Moreover, the parties retain the freedom to vary the rules by agreement.³¹
5. Recognition of Automated Contracts. The E-Contracting Convention recognizes the enforceability of contracts created by automated computer processes in much the same manner as E-SIGN and UETA³²
6. Default Rules for Human Errors in Electronic Communications. The default rules in the E-Contracting Convention for addressing errors made by a person engaging in an electronic transactions with the automated system of another party that does not provide an opportunity for error correction are very similar to the rules in UETA (E-SIGN does not address this issue). Moreover, the parties retain the freedom to vary the rules by agreement.³³

³⁰ Compare E-Contracting Convention Article 3 with UETA Section 5(d).

³¹ Compare E-Contracting Convention Article 10 with UETA Section 15.

³² Compare E-Contracting Convention Article 12 with E-SIGN at 15 U.S.C. 7001(h), and UETA Section 14.

³³ Compare E-Contracting Convention Article 14 with UETA Section 10.