

**AMERICAN BAR ASSOCIATION  
SECTION OF SCIENCE & TECHNOLOGY LAW  
SECTION OF INTERNATIONAL LAW  
SECTION OF BUSINESS LAW**

**REPORT TO THE HOUSE OF DELEGATES**

**RECOMMENDATION**

- 1 **RESOLVED**, that the American Bar Association urges the U.S. Government to
- 2 ratify the *United Nations Convention on the Use of Electronic Communications in*
- 3 *International Contracts*.

## **REPORT**

The ABA Section of Science & Technology Law, Section of International Law, and Section of Business Law, (collectively the “ABA Sections”) submit this Report in support of the Recommendation that the United States ratify the *United Nations Convention on the Use of Electronic Communications in International Contracts* (the “E-Contracting Convention” or “Convention”).<sup>1</sup>

The Recommendation furthers ABA Policy set forth in Resolution 303 adopted by the ABA House of Delegates in August 2006, which urged the U.S. Government to become a signatory to the E-Contracting Convention.<sup>2</sup> The Recommendation is also consistent with the ABA Policy set forth in Resolution 114 adopted by the ABA House of Delegates in August 1997. Resolution 114 “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.”<sup>3</sup>

### **Background**

#### **A. History of the E-Contracting Convention**

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.<sup>4</sup> The E-Contracting Convention was open for signature by all countries at United Nations Headquarters in New York, from January 16, 2006 until January 16, 2008. During that period, 18 countries signed the Convention.<sup>5</sup>

The E-Contracting Convention complements and builds upon earlier instruments prepared by UNCITRAL, including the UNCITRAL Model Law on Electronic

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<sup>1</sup> A copy of the Convention is available at [www.uncitral.org/uncitral/en/uncitral\\_texts/electronic\\_commerce/2005Convention.html](http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention.html).

<sup>2</sup> Resolution 303 focused only on signing the Convention because at the time there was a short window of opportunity for the U.S. to participate in a signing ceremony at the U.N.

<sup>3</sup> See ABA Resolution No.114, adopted by the ABA House of Delegates at its meeting on August 5-6, 1997.

<sup>4</sup> See UN Press release at <http://www.un.org/News/Press/docs/2005/ga10424.doc.htm>.

<sup>5</sup> China, Russia, Korea, Singapore, Philippines, Saudi Arabia, Central African Republic, Colombia, Honduras, Iran, Lebanon, Madagascar, Montenegro, Panama, Paraguay, Senegal, Sierra Leone, Sri Lanka.

Commerce.<sup>6</sup> The U.S. and the American Bar Association 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.<sup>7</sup>

## **B. 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.

The E-Contracting Convention applies only to business-to-business transactions<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup>
2. Elimination of Legal Barriers to E-Commerce. The Convention eliminates the primary legal barriers to e-commerce by:<sup>11</sup>
  - (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.

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<sup>6</sup> See United Nations, UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996, available at [www.uncitral.org/english/texts/electcom/ecommerceindex.htm](http://www.uncitral.org/english/texts/electcom/ecommerceindex.htm)

<sup>7</sup> The ABA was also well represented in the drafting process. In addition to the ABA’s own Delegation, which participated as an NGO, members of the ABA from the Sections of Science & Technology Law, Business, and International Law participating on several delegations, including the U.S. Delegation, the World Bank Delegation, and the ICC Delegation.

<sup>8</sup> Consumer contracts are excluded. See E-Contracting Convention, Article 2(1)(a).

<sup>9</sup> 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.

<sup>10</sup> E-Contracting Convention, Article 8.

<sup>11</sup> E-Contracting Convention, Article 9.

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.<sup>12</sup>
4. Default Rules for Electronic Communications. The Convention provides default rules defining the time and place of sending and receipt of electronic communications.<sup>13</sup> 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.<sup>14</sup>
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.<sup>15</sup>

The E-Contracting Convention excludes a variety of transactions from its scope. Specifically, it excludes electronic communications relating to consumer contracts, and transactions in certain financial markets subject to specific regulation or industry standards. The latter category of transactions have been excluded because the financial service sector is already subject to well-defined regulatory controls and industry standards that address issues relating to electronic commerce in an effective way for the worldwide functioning of that sector. Finally the Convention does not apply to negotiable instruments or documents of title, 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, in view of the particular difficulty of creating an electronic equivalent of paper-based negotiability.<sup>16</sup>

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<sup>12</sup> E-Contracting Convention, Article 8.

<sup>13</sup> E-Contracting Convention, Article 10.

<sup>14</sup> E-Contracting Convention, Article 12.

<sup>15</sup> E-Contracting Convention, Article 14.

<sup>16</sup> E-Contracting Convention, Article 2.

## Discussion

### **1. The E-Contracting Convention will provide a basic 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.

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.<sup>17</sup>

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

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<sup>17</sup> 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, there may be some international treaties where application of the enabling provisions of the E-Contracting Convention might be inappropriate. Accordingly, the Section of Science & Technology Law and other Sections as may be subsequently determined are 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.

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.<sup>18</sup>

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.”<sup>19</sup> To encourage electronic commerce, the U.S. government in 1997 adopted a policy that supported “the development of both a domestic and global uniform commercial legal framework that recognizes, facilitates, and enforces electronic transactions worldwide.”<sup>20</sup> 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.”<sup>21</sup>

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”)<sup>22</sup> enacted in 2000, and the Uniform Electronic Transactions Act (“UETA”)<sup>23</sup> 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

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<sup>18</sup> 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.

<sup>19</sup> A Framework for Global Electronic Commerce (July 1, 1997), available at [www.technology.gov/digeconomy/framework.htm](http://www.technology.gov/digeconomy/framework.htm)

<sup>20</sup> *Id.*

<sup>21</sup> See ABA Resolution No.114, adopted by the ABA House of Delegates at its meeting on August 5-6, 1997.

<sup>22</sup> 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](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_cong_bills&docid=f:s761enr.txt.pdf).

<sup>23</sup> 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](http://www.law.upenn.edu/bll/ulc/fnact99/1990s/ueta99.htm).

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,<sup>24</sup> and that electronic records and electronic signatures will not be denied admissibility solely because of their electronic form.

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.

In 2006 the ABA House of Delegates agreed with this view, and adopted Resolution 303 that “urge[d] the U.S. Government to become a signatory” to the Convention.

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,

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<sup>24</sup> 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).

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).<sup>25</sup> 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.<sup>26</sup> 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, the expression of support that will be provided by ratifying the Convention is critical to maintaining U.S. leadership and credibility on these issues. Specifically, ratification by the U.S. will:

- Help to encourage other countries to 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

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<sup>25</sup> 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](http://www.uncitral.org/pdf/english/workinggroups/wg_ec/wp-77.pdf).

<sup>26</sup> 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)

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 ratify the E-Contracting Convention.

Respectfully submitted,

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May 7, 2008

## 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.<sup>27</sup>
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.<sup>28</sup>
  - (b) recognize that electronic signatures satisfy signing requirements;<sup>29</sup> and
  - (c) recognize that, for evidentiary requirements, electronic records satisfy originality requirements.<sup>30</sup>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.<sup>31</sup>
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.<sup>32</sup>

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<sup>27</sup> Compare E-Contracting Convention Article 8 with E-SIGN at 15 U.S.C. 7001(a), and UETA Section 7.

<sup>28</sup> Compare E-Contracting Convention Article 9(2) with E-SIGN at 15 U.S.C. 7001(a), and UETA Section 7(c).

<sup>29</sup> Compare E-Contracting Convention Article 9(3) with E-SIGN at 15 U.S.C. 7001(a), and UETA Section 7(d).

<sup>30</sup> 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).

<sup>31</sup> 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 the signature.

<sup>32</sup> Compare E-Contracting Convention Article 3 with UETA Section 5(d).

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.<sup>33</sup>
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 UETA<sup>34</sup>
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.<sup>35</sup>

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<sup>33</sup> Compare E-Contracting Convention Article 10 with UETA Section 15.

<sup>34</sup> Compare E-Contracting Convention Article 12 with E-SIGN at 15 U.S.C. 7001(h), and UETA Section 14.

<sup>35</sup> Compare E-Contracting Convention Article 14 with UETA Section 10.