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WORKING GROUP FOR THE PREPARATION OF
PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS

UNIDROIT PRINCIPLES AND ELECTRONIC COMMERCE

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UNIDROIT Contract Principles and Electronic Commerce

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1 Freedom of Contract

Article 1.1 - Freedom of Contract

The parties are free to enter into a contract and determine its content.

[Comment] This is an important principle for electronic commerce as well as for traditional commercial transactions. There was a strong opinion among the delegates that this principle should be included in the UNCITRAL Model Law.

UNCITRAL Model Law

Article 4. Variation by agreement

- (1) As between parties involved in generating, sending, receiving, storing or otherwise processing data messages, and except as otherwise provided, the provisions of chapter III may be varied by agreement.
- (2) Paragraph (1) does not affect any right that may exist to modify by agreement any rule of law referred to in chapter II.

2 Form Requirements

Article 1.2 - No Form Required

Nothing in these Principles requires a contract to be concluded in or evidenced by writing. It may be proved by any means, including witnesses.

[Comment] Since form requirements are the most substantial obstacles for electronic commerce, this provision has an important role in electronic commerce. The working group may wish to consider whether we need a provision about the validity of a contract concluded by way of electronic means and a provision that declares the admissibility and evidential weight of electronic data.

UNCITRAL Model Law

Article 11. Formation and validity of contracts

- (1) In the context of contract formation, unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by means of data messages. Where a data message is used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that a data message was used for that purpose.
- (2) The provisions of this article do not apply to the following: [...].

Article 12. Recognition by parties of data messages

- (1) As between the originator and the addressee of a data message, a declaration of will or other statement shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message.
- (2) The provisions of this article do not apply to the following: [...].

3 Binding Character of Contract

Article 1.3 - Binding Character of Contract

A contract validly entered into is binding upon the parties. It can only be modified or terminated in accordance with its terms or by agreement or as otherwise provided in these Principles.

[Comment] This is also an important principle for electronic commerce. See UNCITRAL Model Law Article 11 cited above.

4 Notice

Article 1.9 - Notice

- (1) *Where notice is required it may be given by any means appropriate to the circumstances.*
- (2) *A notice is effective when it reaches the person to whom it is given.*
- (3) *For the purpose of paragraph (2) a notice "reaches" a person when given to that person orally or delivered at that person's place of business or mailing address. For the purpose of this article "notice" includes a declaration, demand, request or any other communication of intention.*

[Comment] As to the concept of "reach" in (3), we need to decide whether a provision like Article 15(2) should be incorporated into the Principles.

UNCITRAL Model Law Article 15

Article 15. Time and place of dispatch and receipt of data messages

- (1) Unless otherwise agreed between the originator and the addressee, the dispatch of a data message occurs when it enters an information system outside the control of the originator or of the person who sent the data message on behalf of the originator.
- (2) Unless otherwise agreed between the originator and the addressee, the time of receipt of a data message is determined as follows:
 - (a) if the addressee has designated an information system for the purpose of receiving data messages, receipt occurs:
 - (i) at the time when the data message enters the designated information system; or
 - (ii) if the data message is sent to an information system of the addressee that is not the designated information system, at the time when the data message is retrieved by the addressee;

- (b) if the addressee has not designated an information system, receipt occurs when the data message enters an information system of the addressee.
- (3) Paragraph (2) applies notwithstanding that the place where the information system is located may be different from the place where the data message is deemed to be received under paragraph (4).
- (4) Unless otherwise agreed between the originator and the addressee, a data message is deemed to be dispatched at the place where the originator has its place of business, and is deemed to be received at the place where the addressee has its place of business. For the purposes of this paragraph:
- (a) if the originator or the addressee has more than one place of business, the place of business is that which has the closest relationship to the underlying transaction or, where there is no underlying transaction, the principal place of business;
- (b) if the originator or the addressee does not have a place of business, reference is to be made to its habitual residence.
- (5) The provisions of this article do not apply to the following: [...].

5 Writing

Article 1.10 - Definitions

In these Principles

- “court” includes an arbitral tribunal;
- where a party has more than one place of business the relevant “place of business” is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract;
- “obligor” refers to the party who is to perform an obligation and “obligee” refers to the party who is entitled to performance of that obligation.
- “writing” means any mode of communication that preserves a record of the information contained therein and is capable of being reproduced in tangible form.

[Comment] In defining the concept of “writing”, the functional equivalent approach which is adopted in UNCITRAL Model Law seems to be more appropriate than extending the traditional concept which is closely connected with paper. If the functional equivalent approach is to be adopted, it might be desirable to redraft the definition of “writing” in Article 1.10 and add some words concerning non-paper modes of communication such as electronic data along the line of Article 6 of the UNCITRAL Model Law.

UNCITRAL Model Law

Article 6. Writing

- (1) Where the law requires information to be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent reference.
- (2) Paragraph (1) applies whether the requirement therein is in the form of an obligation or whether the law simply provides consequences for the information not being in writing.

- (3) The provisions of this article do not apply to the following: [...].

6 Acknowledgement

[Comment] In electronic commerce, acknowledgement of receipt is often required by a sender of an electronic message. It might be desirable to add a provision about acknowledgement.

UNCITRAL Model Law

Article 14. Acknowledgement of receipt

- (1) Paragraphs (2) to (4) of this article apply where, on or before sending a data message, or by means of that data message, the originator has requested or has agreed with the addressee that receipt of the data message be acknowledged.
- (2) Where the originator has not agreed with the addressee that the acknowledgement be given in a particular form or by a particular method, an acknowledgement may be given by
- (a) any communication by the addressee, automated or otherwise, or
 - (b) any conduct of the addressee, sufficient to indicate to the originator that the data message has been received.
- (3) Where the originator has stated that the data message is conditional on receipt of the acknowledgement, the data message is treated as though it has never been sent, until the acknowledgement is received.
- (4) Where the originator has not stated that the data message is conditional on receipt of the acknowledgement, and the acknowledgement has not been received by the originator within the time specified or agreed or, if no time has been specified or agreed, within a reasonable time, the originator:
- (a) may give notice to the addressee stating that no acknowledgement has been received and specifying a reasonable time by which the acknowledgement must be received; and
 - (b) if the acknowledgement is not received within the time specified in subparagraph (a), may, upon notice to the addressee, treat the data message as though it had never been sent, or exercise any other rights it may have.
- (5) Where the originator receives the addressee's acknowledgement of receipt, it is presumed that the related data message was received by the addressee. That presumption does not imply that the data message corresponds to the message received.
- (6) Where the received acknowledgement states that the related data message met technical requirements, either agreed upon or set forth in applicable standards, it is presumed that those requirements have been met.
- (7) Except in so far as it relates to the sending or receipt of the data message, this article is not intended to deal with the legal consequences that may flow either from that data message or from the acknowledgement of its receipt.

7 A Fixed Period of Time for Acceptance

Article 2.8 - Acceptance within a Fixed Period of Time

(1) *A period of time for acceptance fixed by the offeror in a telegram or a letter begins to run from the moment the telegram is handed in for dispatch or from the date shown on the letter or, if no such date is shown, from the date shown on the envelope. A period of time for acceptance fixed by the offeror by means of instantaneous communication begins to run from the moment that offer reaches the offeree.*

(2) *Official holidays or non-business days occurring during the period for acceptance are included in calculating the period. However, if a notice of acceptance cannot be delivered at the address of the offeror on the last day of the period because that day falls on an official holiday or a non-business day at the place of business of the offeror, the period is extended until the first business day which follows.*

[Comment] It might be necessary to reconsider the phrase of “by means of instantaneous communication “ in para. (1). Electronic communication through computer networks may not be instantaneous, because substantial time could pass before the “receipt”, which should be defined in line with Article 15 of the UNCITRAL Model Law, would occur.

See Article 15 of the UNCITRAL Model Law cited above.

8 Written Modification Clause

Article 2.18 - Written Modification Clause

A contract in writing which contains a clause requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated. However, a party may be precluded by its conduct from asserting such a clause to the extent that the other party has acted in reliance on that conduct.

[Comment] It should be made clear whether the meaning of the term “writing” in this provision is limited to paper documents or includes functional equivalents of paper documents. If the latter is the case, the meaning of this provision would be to restrict the means of modification or termination to the one agreed upon between the parties.

9 Incorporation by reference

Article 2.19 - Contracting Under Standard Terms

(1) *Where one party or both parties use standard terms in concluding a contract, the general rules of formation apply, subject to Articles 2.20 - 2.22.*

(2) *Standard terms are provisions which are prepared in advance for general and repeated use by one party and which are actually used without negotiation with the other party.*

[Comment] In electronic commerce, standard terms play a very important role. In order to make sure that standard terms which are not set out but only referred to by certain symbols shall be effectively incorporated into the contract, a new provision was added to the UNCITRAL Model Law as Article 5 bis in 1998. A similar provision might be necessary in the Principles. To the extent that such standard terms are incorporated

into the contract, the regulation of their contents would be required. In this sense, Article 2.20 of the Principles is very useful.

UNCITRAL Model Law

Article 5 bis. Incorporation by reference

Information shall not be denied legal effect, validity or enforceability solely on the grounds that it is not contained in the data message purporting to give rise to such legal effect, but is merely referred to in that data message (as adopted by the Commission at its thirty-first session, in June 1998).

Article 2.20 - Surprising Terms

(1) *No term contained in standard terms which is of such a character that the other party could not reasonably have expected it, is effective unless it has been expressly accepted by that party.*

(2) *In determining whether a term is of such a character regard is to be had to its content, language and presentation.*

10 Lack of authority

Article 3.1 - Matters Not Covered

These Principles do not deal with invalidity arising from

- (a) lack of capacity;*
- (b) lack of authority;*
- (c) immorality or illegality.*

[Comment] The UNIDROIT Principles do not deal with invalidity arising from a lack of authority. However, “lack of authority”, or attribution of the information is a very important problem in electronic commerce. In particular, impersonation by an unauthorized person has to be dealt with.

The revised version of the Principles should provide rules on the attribution of electronic documents, and on the legal effect of declaration of will by an unauthorized person.

UNCITRAL Model Law has Article 13 on this matter. The working group on electronic commerce is discussing the possibility of a special rule with respect to electronic signatures. A consensus has not yet achieved.

UNCITRAL Model Law

Article 13. Attribution of data messages

- (1) A data message is that of the originator if it was sent by the originator itself.
- (2) As between the originator and the addressee, a data message is deemed to be

that of the originator if it was sent:

- (a) by a person who had the authority to act on behalf of the originator in respect of that data message; or
 - (b) by an information system programmed by, or on behalf of, the originator to operate automatically.
- (3) As between the originator and the addressee, an addressee is entitled to regard a data message as being that of the originator, and to act on that assumption, if:
- (a) in order to ascertain whether the data message was that of the originator, the addressee properly applied a procedure previously agreed to by the originator for that purpose; or
 - (b) the data message as received by the addressee resulted from the actions of a person whose relationship with the originator or with any agent of the originator enabled that person to gain access to a method used by the originator to identify data messages as its own.
- (4) Paragraph (3) does not apply:
- (a) as of the time when the addressee has both received notice from the originator that the data message is not that of the originator, and had reasonable time to act accordingly; or
 - (b) in a case within paragraph (3)(b), at any time when the addressee knew or should have known, had it exercised reasonable care or used any agreed procedure, that the data message was not that of the originator.
- (5) Where a data message is that of the originator or is deemed to be that of the originator, or the addressee is entitled to act on that assumption, then, as between the originator and the addressee, the addressee is entitled to regard the data message as received as being what the originator intended to send, and to act on that assumption. The addressee is not so entitled when it knew or should have known, had it exercised reasonable care or used any agreed procedure, that the transmission resulted in any error in the data message as received.
- (6) The addressee is entitled to regard each data message received as a separate data message and to act on that assumption, except to the extent that it duplicates another data message and the addressee knew or should have known, had it exercised reasonable care or used any agreed procedure, that the data message was a duplicate.

11 Exemption Clauses

Article 7.1.6 - Exemption Clauses

A clause which limits or excludes one party's liability for non-performance or which permits one party to tender performance substantially different from what the other party reasonably expected may not be invoked if it would be grossly unfair to do so, having regard to the purpose of the contract.

[Comment] This provision is important to electronic commerce in terms of the regulation of standard terms. The current draft of Uniform Provisions on Electronic Signatures contains the phrase “grossly unfair” which was adopted from UNIDROIT Principles. However, this phrase invited a number of oppositions. In particular, one delegate said that this phrase makes no sense in their own law. In response, the chairman pointed out that this phrase was adopted from UNIDROIT Principles and the principles should be respected since they were drafted by outstanding contract law scholars. The critical delegate again criticized that the UNIDROIT Principles were drafted by academic scholars and they do not reflect practices. Other delegates were

also not in favor of this phrase. Only one delegate supported the phrase adopted from UNIDROIT Principles enthusiastically. This was the Japanese delegate.

But one delegate suggested that since there seemed to be no substantial disagreement among delegates on the basic idea of the principle except terminology, the principle should be adopted with the wording, which would invite the least objections. The following is the revised version of the original text.

UNCITRAL DRAFT UNIFORM RULES ON ELECTRONIC SIGNATURES

Article 11. Contractual liability

(1) As between a certification authority issuing a certificate and the holder of that certificate [or any other relying party having a contractual relationship with the certification authority], the rights and obligations of the parties [and any limitation thereon] are determined by their agreement [subject to applicable law].

(2) [Subject to article 10], a certification authority may, by agreement, exempt itself from liability for any loss resulting from reliance on the certificate. However, the clause which limits or excludes the liability of the certification authority may not be invoked to the extent that exclusion or limitation of contractual liability would [be grossly unfair] [be inherently unfair and lead to an evident imbalance between the parties][unjustifiably give one party an excessive advantage], having regard to the purpose of the contract and other relevant circumstances.