

(iii) Secretariat Study

I. A Report on Legislative Activities of United Nations and other Organization concerned with International Trade Law

A. Report on the work done by the United Nations Commission on International Trade Law (UNCITRAL) at its Twenty-Ninth Session, New York (1996)

I. Introduction

The twenty-ninth session of UNCITRAL was held in New York from 28 May to 14 June 1996. The substantive topics before this session were: (i) Electronic Data Interchange: draft Model Law, (ii) International Commercial Arbitration: draft Notes on Organizing Arbitral Proceedings, (iii) Build-Operate-Transfer (BOT) projects, (iv) Crossborder Insolvency, and (v) Receivables financing: assignment of receivables.

At this session, the major accomplishments of the Commission were in the areas of Electronic Data Interchange (EDI) and International Commercial Arbitration. In the field of EDI, the Commission formally adopted the text of the Model Law on Electronic Commerce along with a Guide to Enactment of this Model Law with a view to providing guidance to legislators that might wish to apply or enact the Model law. In the field of International Commercial Arbitration, the Commission approved the substance of the Draft Notes on Organizing Arbitral Proceedings as modified by it at the present session and decided to entitle the adopted text as 'UNCITRAL Notes on Organizing Arbitral Proceedings' and to produce it as a separate publication for wider circulation in the concerned circles. On the topic of BOT Projects, significant progress was made in the sense that the Secretariat was asked to undertake the preparation of a legislative guide for States to assist them in enacting or modernizing their national legislation related to BOT projects in general or specific areas. As for the contractual aspects of the BOT projects, the Secretariat has been directed to continue

monitoring the work of other organizations such as ECE and International Federation of Consulting Engineers (FIDIC) with a final objective of preparing a legal guide on selected types of contractual clauses in project agreements between governments and concessionaires that give rise to particular difficulties

As regards the topic of Cross-border Insolvency, the Commission noted with appreciation the work accomplished by its Working Group on Insolvency Law resulting in the first draft provisions on judicial cooperation and access and recognition in cross-border insolvency and expressed the hope that the Working Group would be able to submit a draft legislative text for consideration at its thirtieth session in 1997. Subsequently, the Working Group at its twentieth session, 7-18 October 1996 (A/CN.9/433) and twenty first session 20 - 31 January 1997 (A/CN.9/435) progressed with the consideration of the newly revised articles of the draft UNCITRAL Model Legislative Provisions on Cross-Border Insolvency, presented by the Secretariat. At its twenty-first session, the Working Group considered draft articles 1 to 22, but for lack of time was unable to discuss draft article 23. Yet, in line with the hope expressed by the Commission at its twenty-ninth session, the Working Group decided to submit the draft Model Legislative Provisions to the Commission for consideration and completion at its thirtieth session, scheduled to be held on 12 - 30 May 1997.

In regard to the last topic of Assignment in Receivables Financing, the Commission noted the progress made by its Working Group on International Contract Practices which has been entrusted with the task of preparing a uniform law on assignment in receivables financing. Subsequently, the Working Group on International Contract Practices, at its twenty-fifth session (8-19 July, 1996) adopted the assumptions that the uniform law being prepared would take the form of a convention and would harmonize assignment - related practices existing under national laws (A/CN.9/432). The Working Group considered the revised version of the draft uniform rules (A/CN.9/WG.11/WP.87) and requested the Secretariat to prepare a revised draft in the light of the deliberations at the Working Group.

Since the work in UNCITRAL on the topics of Cross-border Insolvency and Assignment in Receivables Financing is still in formative stages, the following note is focussed only on (i) Model Law on Electronic Commerce, (ii) Notes on Organizing Arbitral Proceedings; and (iii) BOT Projects.

II. Electronic Data Interchange :

Model Law on Electronic Commerce and Guide

Background

The Commission at its 25th session in 1992 had mandated its Working Group on EDI to prepare the draft of a model law so as to evolve a legal framework applicable to exchanges of commercial transactions involving the use of EDI and other modern means of communication. The Working Group on EDI devoted its 25th to 28th sessions for that purpose, and at its 28th session approved the Draft Model Law on Legal Aspects of EDI and related means of communication¹ consisting of 14 articles. The Commission at its 28th session (1995) approved the text of Articles 1 and 3 to 14, leaving the remaining articles for consideration at its 29th session. The Commission, at its 28th session, had also reviewed the draft of a Guide prepared by the Secretariat as a companion to the Model Law on EDI and had asked the Secretariat to revise it in the light of suggestions made at that session. A subsequent development was that the Working Group on EDI at its 30th session had prepared additional draft statutory provisions dealing with specific issues of contracts of carriage of goods involving the use of data messages for possible addition as part II of the Model Law.² Thus, at the 29th session, the Commission had before it for consideration; (i) Articles 2 and 12 to 14 of the Model Law; (ii) the additional draft statutory provisions prepared by the Working Group on EDI addressing the specific issues of contracts of carriage of goods involving the use of data messages for possible addition as part II to the Model Law; and (iii) and the revised text of the

¹ A/CN.9/406

² A/CN.9/421

draft Guide prepared by the Secretariat.³ At the end of its deliberations, the Commission adopted the final text of the Model Law under the caption "UNCITRAL Model Law on Electronic Commerce" and the Guide to the Enactment of the Model Law mandating their publication as a single document. The Commission has requested the UN Secretary-General to transmit the Model Law and the Guide to Governments and other interested parties and to recommend to States to give favourable consideration to the Model Law when they enact or revise their laws applicable to alternatives to paper-based forms of communication and storage of information.

The UNCITRAL Model Law on Electronic Commerce: An overview

The UNCITRAL Model Law consists of two parts. Part One is intended to regulate electronic commerce in general while Part Two is intended to regulate commerce in specific areas, i.e. the use of electronic media for the carriage of goods presumably by any mode of transportation. Part One is sub-divided into three chapters. Chapter I, which consists of Articles 1 to 4, sets out the general provisions on sphere of application, definitions of the terms used in the Model Law, principles of interpretation and the extent of party autonomy in varying the terms of the Model Law. Chapter II lays down the basic rules for the adaptation of the legal requirements applicable to paper-based forms of communication to data messages. Chapter III, which consists of Articles 11 to 15, sets out the procedural rules for the communication of data messages. Part II which has only one chapter is made up of Articles 16 and 17. As stated earlier, this part addresses issues arising from the use of data messages in the context of contracts of carriage and transport documents.

Article 1 on Sphere of application is applicable to any type of information, which is in the form of electronic data and used for commercial purposes (national or international context). The Model Law provides enough scope for States to incorporate provisions keeping in mind their need for the same, for example the Model Law does not affect the rights of consumers under various national legislations.

³ A/CN.9/426

Article 2 of the Model Law defines "data message", "Electronic data interchange (EDI)", "originator", "addressee", "intermediary and "information system". A "data message" is the information generated, sent, received or stored by electronic, optical or related means. This data is not limited to EDI, electronic mail, telegram, telefax or teletype. The list has been kept illustrative and not exhaustive, keeping in mind future technological innovations. "Electronic data interchange" is the transfer of information from one computer to another in a standardized or structured format; "Originator" is a person by whom or on whose behalf a data message is claimed to have been sent; this does not include a person deputed by the originator; "Addressee" is a person who is supposed to receive the data message generated by the originator but this does not include a person deputed by the addressee. "Intermediary" is a deputed person (on behalf of the originator or the addressee) who is supposed to send, receive, store or perform any other duty with respect to the data message.

Article 3 lays down the principles according to which the Model Law is to be interpreted. These include its international origin and the need to promote uniformity in its application and observance of good faith. Questions not expressly settled therein are to be settled in conformity with the general principles on which the Model Law is based.

Paragraph (1) of Article 4 on Variation by agreement enshrines the principle of party autonomy in relation to Chapter III of Part One of the Model Law entitled Communication of data messages. It allows contractual derogations from the provisions of the Model Law set out in Chapter III. Since this could be misinterpreted as restricting the freedom of contract where it might be recognized by applicable rules of national law, paragraph (2) clarifies that parties are free to modify any rule of law contained in Chapter II entitled "Application of Legal Requirements to Data Messages", if it is permitted by applicable rules of law.

Article 5 on Legal recognition of data messages states that, vis-à-vis paper based forms of communication, any information in the form of data message, shall not be denied legal effect in matters of validity or enforcement.

Article 6 on Writing in para (1) adapts the legal requirement of "writing" to a data message. It states that a data message satisfies the legal requirement of "writing" if the information contained therein is accessible and capable of being used subsequently for reference. Paragraph (2) applies irrespective of the fact, whether the requirement is in the form of a legal obligation or that the law simply provides for consequences for information not being in writing. States are free not to apply the provisions of this article if they so deem fit.

Article 7 on Signature lays down the criteria for adapting the legal requirements of "Signature" to a data message. It states that such requirement will be met if, firstly, a particular method is used to identify the person to whom the data message is attributed and it indicates his approval of the information contained in the data message. Secondly, if the method used was reliable and appropriate for the purpose for which the data message was generated or communicated, in the light of the prevailing circumstances and relevant agreements. Paragraph (2) of this article gives an option to enacting States to exclude the application of this article to matters as may be deemed fit by them.

Article 8 on Original lays down two legal requirements for a data message in "original" form. These are firstly, if there exists a trustworthy assurance as to the integrity of the information contained in the data message from the time it was first generated in its final form and secondly, if required the information is capable of being displayed to the person to whom it is presented. The tests of integrity and reliability are the ability of the information to remain complete and unaltered, despite the fact that an endorsement was added in the normal course of communication, storage or display. The standard of reliability must be assured in light of the purpose for which the information was generated and all other relevant circumstances. States have been given the option of not to applying the provisions of this article, if they so deem fit.

Article 9 on Admissibility and evidentiary value of data messages states that in any legal proceedings the admissibility and evidentiary value of data messages should not be discriminated as against the documentary evidence on the ground that it is an electronic message or if it is the best possible evidence available on the ground that it is not in its original form.

Article 10 on Retention of data messages lays down the conditions for adapting the rule relating to the retention of documents or records to the retention of data messages. These conditions are (i) the information contained should be accessible to be used for future reference; (ii) the data message should be retained in the format in which it was generated, sent or received or in a format that can be demonstrated accurately to represent the message; (iii) the message is retained in its original form so as to indicate its origin and destination, the date and time it was sent or received. The obligation to retain data messages, however, does not extend to retaining any of the transmittal information associated with a data message.

Article 11 on Formation and validity of contracts states that parties are free to validly conclude a contract (offer and acceptance) by means of data messages, unless otherwise agreed. This use of data messages shall not be denied validity or enforceability and shall be placed on par with paper based contracts. States are free to derogate from the application of this rule, if they so deem fit.

Article 12 on Recognition by parties of data messages contains the same trend of legal sanctity, also seen in Articles 5, 9, 10 and 11 which affords legal effect to a declaration of will or any other statement between the originator and addressee of a data message. States are again free to preclude the application of this provision, if they so deem fit.

Article 13 on Attribution of data messages sets out a set of complex but useful provisions. Paragraph (1) states that the originator will be bound by a data message if he sent that message himself. Paragraph (2) further provides that he would also be deemed to be bound by a data message if it was communicated by a person authorized to act on his behalf or by an information system programmed by or on behalf of him to operate automatically. Paragraph (3) deals with two kinds of situations in which the addressee can rely on a data message as being that of the originator: firstly, situations in which the addressee properly applied an authentication procedure previously agreed by the originator, and secondly, situations in which the data message resulted from the actions of a person who by virtue of his relationship with the originator

had access to the originator's authentication procedures. However, under paragraph (4), the originator would be released from the binding effect of the data message after the time the notice was received by the addressee to the effect that the data message was not that of the originator. Under paragraph (5), the addressee is entitled to rely on the data message up to the point of time it learnt that the message was not that of the originator. However, the addressee is not so entitled when he knew or should have known, by exercising reasonable care or using any agreed procedure, that there were errors in the transmission of the data message. Paragraph (6) entitles the addressee to regard each data message as a separate message and to act on that assumption unless he knew or should have known, by exercising reasonable care or using any agreed procedure, that the repetition was a duplication.

Article 14 on Acknowledgement of receipt is supposed to be used on the discretion of the originator, as a part of his business decision. It does not address the legal consequences that follow from non-receipt of acknowledgement. This aspect is left to the national laws. When it is agreed as between the originator and the addressee that an acknowledgement will be sent in a particular format, it may be sent by means of (a) any communication by the addressee, automated or otherwise and (b) any other conduct of the addressee as a sufficient indicator. When it is agreed that a data message is conditional on receipt of an acknowledgement, the message is treated as if it was never sent, until the acknowledgement is received.

Article 15 sets out rules for the determination of the time and place of dispatch and receipt of data messages. A dispatch of a data message occurs when it enters an information system outside the control of the originator or the person who sent the message on behalf of the originator. The time of receipt of a data message occurs (i) where the addressee has designated an information system for the purpose of receipt of the data message, when that data message enters the designated information system, (ii) where the data message does not enter the designated information system, at the time the data is retrieved by the addressee, and (iii) where the addressee has not designated an information system, when the data message enters the information system of 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. Where the originator has more than one place of business, the relevant place of business is that which has the closest relationship to the underlying transaction, but in the absence of an underlying transaction, the principal place of business. Where the originator or the addressee does not have a place of business, reference is to be made to his habitual residence.

Part Two of the Model Law has a single chapter consisting of Articles 16 and 17. This part sets forth rules of a specific nature as distinct from the general rules contained in Part One of the Model Law. Part Two of the Model Law provides a legal framework for facilitating the use of electronic communications in the context of carriage of goods and transport documents. It is intended to apply equally to non-negotiable transfer of documents and to transfer of rights in goods by way of transferrable bills of lading.

Article 16 on Actions related to contracts of carriage of goods states that Part Two is applicable to the use of data message in any action undertaken in connection with or in pursuance of a contract of carriage of goods, without derogating from the provisions of Part One of the Model Law, particularly Articles 7 and 8 of the Model Law setting forth the guarantees of reliability and authenticity of electronic equivalents to transport documents. An illustrative list of 'any action' pursuant to a contract of carriage of goods is set out in subparagraphs (a) to (g) of this article.

Article 17 on Transfer Documents frames rules in regard to the use of data messages relating to transport documents. Paragraphs (1) and (2) stipulate that data messages should be treated as equivalent to paper documents both where the use of specific documents is mandated by law and where parties freely choose to perform an act by means other than writing, but doing so would carry an adverse consequence. Paragraph (3) is a core provision of this article. It states that if a right or obligation is to be conveyed to a particular person, and no other person, and the law requires such conveyance to be effected by the use of a paper document, that requirement is met if such conveyance is effected by using one or more data

messages, provided a reliable method is used to render such data message or messages unique. The word 'unique' qualifying the data message or messages is intended to exclude the possibility of such rights or obligations being transferred to or acquired by other persons. Under paragraph (4), the standard of reliability required for the conveyance of a right or obligation to a particular person under paragraph (3) is to be assessed in the light of the purpose of the conveyance or in the light of all relevant circumstances surrounding the conveyance. Paragraph (5), which is a necessary complement to the paragraph (4), addresses the concerns arising from the simultaneous use of both the paper documents and data messages in connection with the same contract of transport, taking into account the possibility of the parties reverting from data message interchange to paper-based transactions. It states that where data messages are used to effect any action relating to: (i) granting, acquiring, renouncing, surrendering, transferring or negotiating rights in goods, and (ii) acquiring or transferring rights and obligations under a contract of carriage of goods (Article 16, paragraphs (0 and (g)) and subsequently the parties revert to the use of paper documents, no such paper document shall be valid unless the parties had formally terminated the use of data messages and substituted in its place the use of paper documents. The paper document issued in these circumstances must contain a statement of such termination. Such substitution will not affect the rights and obligations of the parties involved. Paragraph (6) provides for the applicability to a contract of carriage of goods contained in, or evidenced by, data messages, of the rules of law that would have been applicable to the contract had it been contained in, or evidenced by, a documentary bill of lading. The purpose of paragraph (6) is to deal directly with the application of certain laws to contracts for carriage of goods by sea. For example, under the Hague and Hague-Visby Rules, a contract of carriage means a contract that is covered by a bill of lading. Use of a bill of lading or similar document of title results in the Hague and Hague-Visby Rules applying compulsorily to a contract of carriage. These Rules would not automatically apply to contracts effected by one or more data messages. Paragraph (6) is intended to ensure that the application of these rules is not excluded by the mere fact that the data messages are used instead of a bill of lading in paper form. Para (7) gives an option to enacting States to exclude the application of this article to matters, as may be deemed fit by them.

The Sixth Committee of the General Assembly, at its Fifty-first Session recommended all States to give favourable consideration to the Model Law on Electronic Commerce when they enact or revise their laws in view of the need for uniformity of the law applicable to alternatives to paper-based methods of communication and storage of information.

Comments

In a changing world scenario and a booming information age, the law needs to keep pace with technological changes. Technological advances are always ahead of legal regulation. In view of this, the Model Law prepared by UNCITRAL to assist States in regulating electronic commerce is a step in the right direction. However, while appreciating this initiative, it must be borne in mind that such a kind of Model Law without financial and technical assistance would mean little to the developing world. In the view of the AALCC Secretariat, UNCITRAL and other international institutions must come forward to promote infrastructure of electronic commerce in the developing regions.

The Model Law is a revolutionary piece of legislation whereby legal sanctity will be accorded to a host of national and international contractual transactions via data messages. This, in the view of the AALCC Secretariat, will throw up a host of issues, such as rights of the originator of data messages, duties of the addressee and rights and liabilities of intermediaries. Intermediaries form a part of the 'service industry', which still remains an issue where legal consensus on the international level has not evolved. Other EDI areas, which need a closer look are control of finances or possible cases of tax evasion and demarcation between commercial and non-commercial agreements. In sum, it is heartening to note that the Model Law provides ample scope for States to enact its provisions, keeping in mind their public policy and interests.

III. UNCITRAL Notes on Organizing Arbitral Proceedings

Background

The Commission commenced work on this topic at the 26th session in 1993.⁴ The first draft entitled "Draft Guidelines for Preparatory Conferences in Arbitral Proceedings" was examined by the Commission in 1994.⁵ Pursuant to the discussion held in that session the Secretariat prepared a text entitled "Draft Notes on organizing Arbitral Proceedings"⁶ which was considered by the Commission at its 28th session in 1995.⁷ At the present session the Draft Notes on Organizing Arbitral Proceedings were finalized. The UNCITRAL Notes consists of an introduction outlining the nature, purpose, use, procedure and subject-matters to be considered in organizing an arbitral proceedings. The Notes also contain a detailed list of matters for possible consideration in organizing arbitral proceedings.

Salient Features of the UNCITRAL Notes on Arbitral Proceedings:

Purpose

The purpose of the Notes is to assist legal practitioners in arbitration in listing the main questions or issues arising in organizing an arbitral proceeding. The emphasis is on helping the growth of international commercial arbitration.

Non-binding nature

The Notes are persuasive in nature and not binding. Arbitral tribunals are free to use the Notes if they so deem fit. The Notes are general in nature and are not to be used as arbitration rules.

⁴ Doc. No. A/48/17, pages 291-296

⁵ Doc. No. A/CN.9/396/Add.1.

⁶ Doc. No. A/CN.9/410.

⁷ Doc. No. A/50/17, paras 314-373.

Discretion and usefulness of well-timed decisions in organizing proceedings.

Subject to the law governing the procedure for arbitration, the parties are free to agree to the arbitration rules binding upon them. This helps the arbitral tribunal to take decisions in organizing an arbitral proceeding which enables a just and cost efficient settlement of the dispute.

The arbitral tribunal is thereby granted a certain amount of discretion to inform the parties of a time-limit, and manner in which the arbitration can be conducted. This is especially helpful in organizing international arbitral proceedings where the parties are from different legal systems. Such guidance will set aside a lot of misunderstandings, delays and increased costs.

Process of making decisions on organizing arbitral proceedings

The decision by an arbitral tribunal on organizing arbitral proceeding can be taken with or without prior consultation with the parties. Such consultation can be at one meeting or more, carried out by correspondence or telex or telephonic conversation. A special meeting can be arranged for discussing procedural consultation between the arbitrator and the parties. Such meetings are referred to as "preliminary meeting", "prehearing conference" or "preparatory conference".

List of matters for possible consideration in organizing arbitral proceedings

The Notes suggest a list, followed by annotations of matters on which the arbitral tribunal may want to take decisions on organizing arbitral proceedings. The purpose of the Notes, is to promote a universal practice, taking into consideration the various options available for organizing arbitral proceedings. The Notes also make it clear that the discretion available to the arbitral tribunal in organizing proceedings is subject to the arbitration rules and the law applicable to arbitral procedure.