

*References:*

A/CN.9/406, paras. 42-58  
 A/CN.9/WG.IV/WP.60, article 13  
 A/CN.9/387, paras. 152-163  
 A/CN.9/WG.IV/WP.57, article 13

A/CN.9/373, paras. 134-146  
 A/CN.9/WG.IV/WP.55, paras. 103-108  
 A/CN.9/360, paras. 87-89  
 A/CN.9/WG.IV/WP.53, paras. 74-76  
 A/CN.9/350, paras. 97-100  
 A/CN.9/333, paras. 69-75

**2. Proposal by the Observer for the International Chamber of Commerce: note by the Secretariat**  
 (A/CN.9/WG.IV/WP.65) [Original: English]

1. At the twenty-eighth session of the Working Group, a proposal was made to include in the draft UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication a provision to the effect of ensuring that certain terms and conditions that might be incorporated in a data record by means of a mere reference would be recognized as having the same degree of legal effectiveness as if they had been fully stated in the text of the data record. It was stated that the issue of incorporation by reference of certain terms into EDI messages was crucial to EDI users and that there existed an important need for certainty in the use of that method. It was said that, arguably, EDI was inherently a system of incorporation by reference since EDI messages were meaningless, and of little contractual value, without the incorporation by reference of the relevant communication standards. It was decided that the Working Group would address, in the context of a future session, the issue of incorporation of terms and conditions into a data message by means of a mere reference to such terms and conditions (A/CN.9/406, paras. 90 and 178). As to the planning of future work, the view was expressed that the Working Group at its twenty-ninth session, after completing its consideration of the draft guide to enactment to be prepared by the Secretariat, could have a general discussion on negotiability and transferability of rights in goods. Another view was that the issue of incorporation by reference could also be considered at the twenty-ninth session for possible inclusion in the draft Model Law. A number of delegations expressed their willingness to prepare a brief paper to facilitate discussions on both topics. It was noted, however, that, while the Working Group might have sufficient time for a general discussion, it could not go into detail on either topic (A/CN.9/406, para. 179).

2. Following the twenty-eighth session of the Working Group, the Secretariat received from the observer for the International Chamber of Commerce (ICC) the text of a proposed article on the issue of incorporation by reference, with explanatory notes. The draft article proposed by the ICC together with the explanatory notes is reproduced in the annex to the present note as it was received by the Secretariat.

## ANNEX

### A. Proposed article

The International Chamber of Commerce, Paris proposes the following draft for consideration by the Working Group at its next session regarding the issue of incorporation by reference, as a possible addition to the draft model law. Reference: Report of the

Working Group (Vienna, 3-14 October 1994), (A/CN.9/406), paras. 90 and 179.

#### Article 15. *Incorporation by reference*

When terms, conditions, clauses, agreements, standards, rules or guidelines (collectively "Terms") are [reasonably identified] [specified] in a data message, those terms [may be] [shall be presumed to be], unless otherwise agreed, incorporated by reference in that data message. Such terms shall be as legally effective and binding as if they had been fully stated in the data message, to the extent permitted by law, and except where timely rejected by a party. Certain factors should be considered in determining whether such Terms incorporated by reference shall be considered legally binding, including whether such Terms:

- (a) have been previously specified by applicable contract or by the course of dealing among the parties;
- (b) are in the possession of the addressee of the data message;
- (c) have been previously provided to the addressee from the sender;
- (d) are reasonably accessible to the addressee of the data message [in the normal course of business communications];
- (e) are communicated promptly to the addressee by the sender upon the request of the addressee; or
- (f) are registered or maintained and distributed by a person or entity that is widely recognized in the relevant industry for such purposes and such person or entity is identified in the data message].

This article does not affect incorporation of Terms by trade usage or by business practices established between the parties.

## B. Discussion

### 1. *Incorporation by reference defined*

Incorporation by reference is defined as the method of making one data message or record become a part of another, separate data message or record by referring to the former within the latter, and declaring that the former shall be taken and considered as a part of the latter, the same as if it were fully set out therein. When a data message or record incorporates outside material by reference, the subject matter to which it refers becomes a part of the incorporating data message or record just as if it were set out in full.

### 2. *Incorporation by reference essential to electronic commerce*

EDI and other electronic commerce techniques/methods invariably make intensive use of incorporation by reference. This is necessary for the efficiency of data processing. Indeed, EDI and diverse forms of electronic commerce are inherently and funda-

mentally systems of incorporation by reference. As a practical matter, EDI messages are potentially less legally certain, without the rigorous incorporation by reference of the relevant legal, technical, and administrative terms, conditions, clauses, agreements, standards, rules, or guidelines. Consequently, an explicit rule is indispensable to assure that such incorporation by reference provides electronic commerce legal certainty and the facilitation of computer-based trade. A common example is the growing use of standardized message sets, which are intelligible, and derive legal import in some cases only by reference to the UN/EDIFACT standards.

### 3. *Traditional trade usage and legal tests inadequate*

The traditional use of incorporation by reference for diverse trade terms, such as the ICC's INCOTERMS, UCP 500 and similar terms which are recognized to reflect trade usage, is sometimes considered to enjoy greater legal certainty (when incorporated by reference) than are certain electronic commerce terms (including model EDI/interchange agreements, guidelines and security policies) when such terms are incorporated by reference. Because of the more recent origin of EDI, judicial or other treatment of incorporation by reference may fail to ensure a comparable level of legal certainty.

There is a significant threat that the application of traditional legal tests for determining the enforceability of terms that seek to be incorporated by reference are less effective when applied to corresponding electronic commerce terms because of the inherent differences between traditional and electronic commerce mechanisms. For example, certain traditional legal tests of incorporation by reference include whether the incorporated terms are "clear and conspicuous", whether they contain "suitable words of reference evidencing explicit intention to incorporate", or whether the intended incorporation is "clear and convincing". Such tests may create unintended barriers to the facilitation of electronic trade. Indeed, the proposed new article is consistent with, and imple-

ments the UNCITRAL EDI Rules' recognition of party autonomy. The problem is that methods of notice and access are different in a computer medium, and therefore could in some tribunals be rejected in the absence of supportive language of the type here proposed for UNCITRAL.

### C. *Relevant UNCITRAL Texts*

While it could be argued that some Terms could be covered by the following UNCITRAL texts, it would not be sufficient to cover incorporation by reference in an electronic commerce context.

#### *Article 9(2) of the Vienna Sales Convention*

The parties are considered, unless otherwise agreed, to have impliedly made application to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

[*Editorial note:* This provision was intended to accommodate the incorporation by reference of INCOTERMS and UCP. This particular wording, however, is not entirely appropriate for EDI electronic commerce purpose.]

#### *Article 7 of the Model Law on International Commercial Arbitration*

(1) ... An Arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) ... The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

### 3. *Proposal by the United Kingdom of Great Britain and Northern Ireland: note by the Secretariat (A/CN.9/WG.IV/WP.66) [Original: English]*

1. At the twenty-eighth session of the Working Group, a proposal was made to include in the draft UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication a provision to the effect of ensuring that certain terms and conditions that might be incorporated in a data record by means of a mere reference would be recognized as having the same degree of legal effectiveness as if they had been fully stated in the text of the data record. It was decided that the Working Group would address, in the context of a future session, the issue of incorporation of terms and conditions into a data message by means of a mere reference to such terms and conditions (A/CN.9/406, paras. 90 and 178).

2. The Working Group noted that its recommendation to the Commission that preliminary work should be undertaken on the issue of negotiability and transferability of rights in goods in a computer-based environment as soon as the draft Model Law was completed (A/CN.9/390, para. 158), had found general support in the Commission.<sup>1</sup> It was stated that related legal issues involving electronic registries were a necessary part of such a project (A/CN.9/406, para. 178).

3. As to the planning of future work, the view was expressed that the Working Group at its twenty-ninth session, after completing its consideration of the draft guide to enactment to be prepared by the Secretariat, could have a general discussion on negotiability and transferability of rights in goods. Another view was that the issue of incorporation by reference could also be considered at the twenty-ninth session for possible inclusion in the draft Model Law. A number of delegations expressed their willingness to prepare a brief paper to facilitate discussions on both topics. It was noted, however, that, while the Working Group might have sufficient time for a general discussion, it could not go into detail on either topic (A/CN.9/406, para. 179).

4. Following the twenty-eighth session of the Working Group, the Secretariat received from the delegation of the United Kingdom of Great Britain and Northern Ireland the text of a proposed article on the issue of incorporation by reference, with explanatory comments and the text of a note discussing legal issues of negotiable bills of lading in an EDI context. The draft article proposed by the United Kingdom together with the explanatory comments, and the text of the note are reproduced as annexes I and II to the present note as they were received by the Secretariat.

<sup>1</sup>Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 (A/49/17), para. 201.