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**UNITED NATIONS COMMISSION
ON INTERNATIONAL TRADE LAW
Working Group on Electronic Commerce
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INCORPORATION BY REFERENCE

Proposal by the United Kingdom of Great Britain and Northern Ireland

Note by the Secretariat

1. At its thirtieth session (1997), the Commission had before it the report of the Working Group on the work of its thirty-first session (A/CN.9/437). With respect to the issue of incorporation by reference, the Working Group concluded that no further study by the Secretariat was needed, since the fundamental issues were well known and it was clear that many aspects of battle-of-forms and adhesion contracts would need to be left to applicable national laws for reasons involving, for example, consumer protection and other public-policy considerations. The Working Group was of the opinion that the issue should be dealt with as the first substantive item on its agenda, at the beginning of its thirty-second session (see A/CN.9/437, para. 155). The Commission endorsed the conclusions reached by the Working Group. 1/

^{1/} Official Records of the General Assembly, Fifty-second Session, Supplement No. 17

2. Following the thirty-first session of the Working Group, the Secretariat received from the delegation of the United Kingdom a proposal for a provision dealing with the topic of incorporation by reference, with explanatory notes. The draft article proposed by the United Kingdom together with the explanatory notes are reproduced in the annex to this note as they were received by the Secretariat.

ANNEX

Note by the United Kingdom

1. Incorporation by reference is acceptable in most States, usually with some rules of law providing safeguards. In conventional paper communications it is relatively normal and possible to set out in full all or most of the information in the relevant documents. However, in electronic communications, practitioners do not overload their “data messages” with quantities of free-text when they can take advantage of extrinsic sources of information, databases, code lists, glossaries, etc by making use of abbreviations, codes and other references to such information. In fact practical electronic commerce depends on this to a great extent. The ability to incorporate by reference effectively is therefore particularly important in electronic commerce.
2. The purpose should not be to change existing rules of law on incorporation by reference nor to make new rules for it when using electronic rather than other forms of communication. The provision is intended merely to confirm, for the sake of clarity, that incorporation by reference by electronic means is equally effective as by any conventional, non-electronic means.
3. Throughout this Note reference has been made to “information” being incorporated. Some commentaries assume that it is only the terms of a contract which will be incorporated by reference. In many instances, of course, this will be the case. However, sometimes other information may be involved, which is not necessarily part of a contract. Consequently this Note uses “information” in preference to “terms”, “conditions”, “clauses”, etc.
4. Not all information which is incorporated is intended to have legally binding effect; for example purely factual information may be included. A rule relating to incorporation of information by electronic means should cover all information. Consequently this Note refers to the incorporated information having the same effect as if it were fully expressed; it says nothing about giving it any particular legal status.
5. Attached is a draft of a possible rule. It is drafted as if for use as an article for the Model Law, or something similar, but it could easily be put into a modified form for use in another context, if desired.
6. (i) The draft rule starts by saying that it applies when a data message (not other forms of communication) uses incorporation by reference (*see para. 1 of the draft*).

(ii) It states the overall principle that the incorporated information should have the same effect as if it were fully expressed in the data message (*see para. 2*).

(iii) It then sets out the general safeguards: clear and precise identification of what is being incorporated; identification of where and how it may be accessed; and an indication of intent to incorporate (*see para. 3*).

(iv) In electronic commerce use is sometimes made of a reference to an extrinsic source which is itself made up of abbreviations or other codes which refer, in turn, to another source. This should be acceptable, provided the same safeguards apply (*see para. 4*).

(v) As for the other particular safeguards it is assumed that, any existing rules of law applying to conventional communications should extend to electronic communications. Such rules of law would include those relating to (*see para. 5*):

(a) requirements to give adequate notice of what is being incorporated;

Adequacy is as to timeliness, clarity and emphasis. This is particularly important where there is any existing rule of law to protect consumers or a weaker contracting party.

(b) accessibility to other persons;

This would include contractually affected third parties and any other persons who would need to know about the incorporated information.

(c) acceptance of terms in the context of contract formation;

In some States rules of law may require actual approval of terms by the party who is intended to be bound. Some States, too, may require some terms to be in writing and approved by signature; for example clauses about limiting liability, cancelling or suspending a contract, restricting the ability to object to exceptions and restricting the freedom to contract or sub-contract with third parties. The requirements for writing and signature would, of course, be met by the UNCITRAL Model Law, articles 6 and 7. However, a provision should be made to ensure that States' particular rules of law on these matters are not by-passed when incorporation of terms is done by electronically referring to an extrinsic source.

(d) possible conflicts between provisions which are expressed in a data message and those which are incorporated into it;

The Working Group need not make a new rule about whether incorporated information always, or in certain circumstances, prevails over other information or *vice versa*. However, where existing law governs this, it is important to make it clear that such law is not being changed.

All these are precepts which will be more sensitive, as well as being more likely to being ignored or neglected, when using rapid electronic communications for incorporating information, than when using conventional means of conveying the information. It is therefore particularly important to draw attention to the fact that this suggested new article does not purport to change them. They remain valid.

Article 'ZZZ': Incorporation by reference

(1) This article applies when a data message contains reference to, or its meaning is only fully ascertainable by reference to, information recorded elsewhere ('the further information').

(2) Subject to paragraph (5), the data message shall have the same effect as if the further information were fully expressed in the data message and any reference to the data message will constitute a reference to that message including all further information, if the conditions in paragraph (3) are satisfied.

(3) The conditions mentioned in paragraph (2) are that the data message:

(a) identifies the further information -

(i) by a collective name or description or code; and

(ii) by specifying adequately the record, and the parts of that record, containing the further information and, where that record is not publicly available, the place where, and, in cases where the means of access is either not obvious or is restricted in some way, the means by which, it may be found; and

(b) expressly indicates or carries a clear implication that the data message is intended to have the same effect as if the further information were fully expressed in the data message.

(4) The identification mentioned in paragraph (3)(a) may be made indirectly, by referring to information recorded elsewhere which contains the necessary identification, provided the conditions in paragraph (3) are satisfied with respect to that reference.

(5) Nothing in this article affects -

(a) any rule of law which requires adequate notice to be given of the content of the further information, or of the record or place where, or the means by which such information may be found, or which requires that place or record to be accessible to another person; or

(b) any rule of law relating to the validity of terms for the purpose of contract formation, including the acceptance of an offer.

(c) any rule of law prescribing the effectiveness of the further information being incorporated or the validity of the process of incorporation.

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