

# *The UNCITRAL Draft model law on EDI- its history and its fate*

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## **Background**

UNCITRAL (the U.N. Commission on International Trade Law) was established by the UN General assembly in 1966. Since then, it has worked for the harmonization of international commercial law, notably within the areas of international sale of goods (with the 1980 Vienna Sales Convention, also known as CISG as the most predominant example), international transport of goods (with the co-called "Hamburg rules" of 1978 as a well-known example) and commercial arbitration (with the 1976 arbitration rules and the 1985 model law of commercial arbitration as good examples).

The outstanding feature of UNCITRAL's work is its global character. Representatives of all the legal systems of the world can speak their voice at the UNCITRAL working group meetings and at the annual UNCITRAL commission meeting. Among delegations are diplomatic representatives from local UN missions, representatives from the home departments with jurisdiction over the subject area, and experts with particular knowledge or interest in the subject areas in question.

In 1991 UNCITRAL mandated a working group to deal with the legal issues of EDI. Up till then, the working group had dealt with International Payments. In October 1994, the working group has produced a draft Model law on legal aspects of electronic data interchange (EDI) and in February-March 1995 a set of draft guidelines to the model law to support legislators when preparing the implementation of the model law. Both documents were meant to be agreed at the UNCITRAL session in Vienna in May, 1995.

But things turned out differently. After four days of discussions at the session (at that time, already one day behind a tough schedule because of an exceed of time of the previous item on the agenda) the Commission decided to postpone its final decision on the model law to its next meeting in New York (May 1996). When the decision was taken, UNCITRAL had not even read half way through the model law. The big question now is whether UNCITRAL will be able to pass the draft model law in 1996.

In this outline I will deal with this issue by giving a short explanation of the history behind this and my personal assessment on the prospects for such adoption. I will also make some personal comments on the difficulties of this work and how it might be improved. As an appendix, the full text of the draft model law is included.

Being Denmark's delegate and representative to UNCITRAL and to the EDI working group since 1993, I shall emphasize that this comment is only made on my own behalf. My views are those of a law professor. They

are not given as a representative of the Danish state. No representative of the Danish government has approved the text before publication.

### **The UNCITRAL EDI model law**

The UNCITRAL model law on EDI sets forth how EDI-messages and similar forms of data interchange (including telex and telefax) can work the same way as paper media. By making such general rules, the widespread use of EDI technology may be supported, and thereby also international trade. For various reasons (statutory formalities, the law of evidence, and lack of sophisticated technologies) some legal systems might hesitate in accepting electronic documents and electronic transactions the same way as they treat paper documents.

### **The model law includes three chapters.**

Chapter I includes general provisions as to the sphere of application of the law ("commercial law" in a wide sense), its interpretation and as to certain definitions contained herein.

Chapter II deals with the application of legal requirements to data messages. The general idea is, as set forth in article 4, that information shall not be denied legal effectiveness, validity of enforceability solely on the grounds that it is in the form of a data message. This principle is stated in subsequent provisions dealing with the equivalents of "writing" (article 5), "signature" (article 6) and "original" (article 7). Furthermore, certain provisions regulate the admissibility and evidential value of data messages (article 8) and how requirements of retention of documents in the form of data messages are fulfilled (article 9).

Chapter III deals with the communication of data messages. Its articles, which can be varied by agreement (cf. article 10), establishes when data messages originates, respectively "are deemed" to originate, from the addressee, when and how receipt is acknowledged, and what is the time and place of dispatch and receipt of data messages.

The draft appears in the form of a "model law", not as a convention. One of the reasons for this is the difficulty in obtaining the necessary agreement on a convention. In legal terminology, a model law is merely a recommendation made by a body of government representatives and experts. It is in other words "soft law" as opposed to "hard" legislation in the form of conventions etc.

### **Other items**

The text of the model law does not represent the totality of what the working group has dealt with. At its last two meetings there were intensive discussions on whether the model law should include provisions on "incorporation by reference", that is how EDI messages by use of code words or symbols could refer to provisions outside the message. The proposal was made by the representative from ICC and it was subsequently

supported, though subject to some modifications, by the representatives of U.K. and the U.S., among others. One of the features of accepting incorporation by reference was that this would support a widespread practice. An argument against was the risk that every EDI trading partner would incorporate its provisions thereby creating confusion as to the legal contents of the data message.

After some discussion, the working group decided not to include provisions on "incorporation by reference" in the model law. Instead, the guideline will state that most legal systems of the world will accept incorporated contract provisions as binding, and that the fact that incorporation is made by reference data message does not alter this fact.

### **What went wrong?**

As already stated, the model law was not adopted by the UNCITRAL commission. What was intended to be a formally passage of a well-discussed text, perhaps with some modifications, turned out to be a hard nut to crack. It seems fair to put the question: What went wrong.

Without going into the difficult issue of whether someone is to blame for the fate of the model law (which I think no one really is), it is easy to see some of the mechanisms that came into play:

- \* The commission only had four working days were allocated for the discussions (as compared to the 10 weeks of working group discussions).
- \* There were still some compromises in the draft that some delegations from the working group couldn't accept.
- \* The chairman of the UNCITRAL session had not participated in the working group meeting, and notwithstanding his outstanding capabilities he could only have limited knowledge of the details of the discussions in the group.
- \* A number of the UNCITRAL delegates who had not participated in the working group and who had not even cared to forward comments to the draft prior to the commission meeting, spoke strongly against certain provisions in the text at the session.

As already indicated, no one is to blame for the outcome. Everything was conducted according to UNCITRAL rules and practice. Due to the global character of UNCITRAL's work, it takes time to agree on the texts. It takes time to reach consensus between representatives of all the legal systems of the world. And the fact that we are dealing with highly complex technical and legal issues, does not make things move faster. But one might put the question whether this method of working is suitable for legislation regarding such fast-moving issues as EDI.

### **Can the working method of UNCITRAL be improved?**

The official nature of the work of UNCITRAL and the commitments of its representatives demands time. Therefore, it is not even certain that UNCITRAL will adopt the text at its next meeting. This gives rise to the next question whether the work of UNCITRAL could be improved.

When this question is considered it may be interesting to contrast the slow pace of the UNCITRAL work on EDI to other international EDI bodies, among them the Working Party 4 under the UN Economic Commission of Europe (ECE). WP.4 has already been successful in proposing the EDIFACT standard which today is one of the most fundamental standards for EDI. It now moves on to produce a UN/ECE Recommendation on the commercial use of interchange agreements for electronic data interchange (TRADE\WP.4\R.1133). Further initiatives are in the melting pot. One of the reasons to the success of the WP.4 work may very well be that the members of the working party do not base their work on a government mandate. They are primarily appointed by businesses and business organizations. Accordingly, they do not have to report back to a government that in turn gets obliged to prepare new national legislation for adoption etc.

The work of UNCITRAL might very well be improved by rules on the procedure of UNCITRAL. Let me give you some short proposals:

One suggestion could be to introduce a written procedure by which objections to proposed texts can only be made to the commission if they are submitted to the UNCITRAL secretariat prior to the session. Such a rule would make it possible to estimate time needed for each item. Furthermore, it would help the delegates to prepare for the meeting.

Secondly, it might be helpful if the chairman of a working group was the born chairman of the commission during agenda items concerning proposals of the working group. Such a rule would make it easier for the chairman to fulfill the tough job that every chairman has to do in cutting through discussions.

Third, one might consider a rule according to which the final adoption of texts like these are made at specific sessions of experts (as opposed to the annual UNCITRAL sessions where a substantial amount of different items are on the agenda). By such a rule, working group meetings would be transformed to commission meetings. But since there is no legal difference as to what delegations can participate in working group meetings, as opposed to commission meetings, the difference may not be that important. In regard to other UNCITRAL items, the annual UNCITRAL commission meeting might then transform into a rather short annual meeting where the work of UNCITRAL is planned.

In order to implement such proposals, a broad discussion between the affected parties is necessary. Changing international institutions is not easy. But if we want UNCITRAL to be an important actor in international harmonization work, changes may be necessary.

## **DRAFT MODEL LAW ON LEGAL ASPECTS OF ELECTRONIC DATA INTERCHANGE (EDI) AND RELATED MEANS OF COMMUNICATION**

(as approved by the UNCITRAL Working Group on Electronic Data Interchange at its twenty-eighth session, held at Vienna, from 3 to 14 October 1994)

## CHAPTER I. GENERAL PROVISIONS\*

### Article 1. Sphere of application\*\*

This Law forms part of commercial\*\*\* law. It applies to any kind of information in the form of a data message.

### Article 2. Definitions

For the purposes of this Law:

(a) "Data message" means information generated, stored or communicated by electronic, optical or analogous means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy;

(b) "Electronic data interchange (EDI)" means the electronic transfer from computer to computer of information using an agreed standard to structure the information;

(c) "Originator" of a data message means a person by whom, or on whose behalf, the data message purports to have been generated, stored or communicated, but it does not include a person acting as an intermediary with respect to that data message;

\_\_\_\_\_This text includes notes\_\_\_\_\_

\* This Law does not override any rule of law intended for the protection of consumers.

\*\* The Commission suggests the following text for States that might wish to limit the applicability of this Law to international data messages:

This Law applies to a data message as defined in paragraph (1) of article 2

where the data message relates to international commerce.

\*\*\* The term \_commercial\_ should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.

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(d) "Addressee" of a data message means a person who is intended by the originator to receive the data message, but does not include a person acting as an

intermediary with respect to that data message;

(e) "Intermediary", with respect to a particular data message, means a person who, on behalf of another person, receives, transmits or stores that data message or provides

other services with respect to that data message;

(f) "Information system" means a system for generating, transmitting, receiving or storing information in a data message.

### **Article 3. Interpretation**

(1) In the interpretation of this Law, regard is to be had to its international source and to the need to promote uniformity in its application and the observance of good faith.

(2) Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

## **CHAPTER II. APPLICATION OF LEGAL REQUIREMENTS TO DATA MESSAGES**

### **Article 4. Legal recognition of data messages**

Information shall not be denied legal effectiveness, validity or enforceability solely on the grounds that it is in the form of a data message.

### **Article 5. Writing**

(1) Where a rule of law requires information to be in writing or to be presented in writing, or provides for certain consequences if it is not, a data message satisfies that rule if the information contained therein is accessible so as to be usable for subsequent reference.

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

## **Article 6. Signature**

(1) Where a rule of law requires a signature, or provides for certain consequences in the absence of a signature, that rule shall be satisfied in relation to a data message if:

(a) a method is used to identify the originator of the data message and to indicate the originator's approval of the information contained therein; and

(b) that method is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any agreement between the originator and the addressee of the data message.

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

## **Article 7. Original**

(1) Where a rule of law requires information to be presented in its original form, or provides for certain consequences if it is not, a data message satisfies that rule if:

(a) that information is displayed to the person to whom it is to be presented; and

(b) there exists a reliable assurance as to the integrity of the information between the time when it was first composed in its final form, as a data message or otherwise, and the time when it is displayed.

(2) Where any question is raised as to whether subparagraph (b) of paragraph (1) of this article is satisfied:

(a) the criteria for assessing integrity shall be whether the information has remained complete and unaltered, apart from the addition of any endorsement and any change which arises in the normal course of communication, storage and display; and

(b) the standard of reliability required shall be assessed in the light of the purpose for which the information was composed and in the light of all the relevant circumstances.

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

## **Article 8. Admissibility and evidential value of data messages**

(1) In any legal proceedings, nothing in the application of the rules of evidence shall apply so as to prevent the admission of a data message in evidence:

(a) on the grounds that it is a data message; or,

(b) if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form.

(2) Information presented in the form of a data message shall be given due evidential weight. In assessing the evidential weight of a data message, regard shall be had to the reliability of the manner in which the data message was generated, stored or communicated, to the reliability of the manner in which the integrity of the information was maintained, to the manner in which its originator was identified, and to any other relevant factor.

(3) Subject to any other rule of law, where subparagraph (b) of paragraph (1) of article 8 is satisfied in relation to information in the form of a data message, the information shall not be accorded any less weight in any legal proceedings on the grounds that it is not presented in its original form.

#### **Article 9. Retention of data messages**

(1) Where it is required by law that certain documents, records or information be retained, that requirement shall be satisfied by retaining data messages, provided that the following conditions are met:

(a) the information contained therein is accessible so as to be usable for subsequent reference; and

(b) the data message is retained in the format in which it was generated, transmitted or received, or in a format which can be demonstrated to represent accurately the information generated, transmitted or received; and

(c) transmittal information associated with the data message, including, but not limited to, originator, addressee(s), and date and time of transmission, is retained.

(2) An obligation of an addressee to retain information in accordance with paragraph (1) shall not extend to any part of such information which is transmitted for communication control purposes but which does not enter the information system of, or designated by, the addressee.

(3) A person may satisfy the requirements referred to in paragraph (1) by using the services of any other person, provided that the above conditions are satisfied.

### **CHAPTER III. COMMUNICATION OF DATA MESSAGES**

#### **Article 10. Variation by agreement**

As between parties involved in generating, storing, communicating, receiving or otherwise processing data messages, and except as otherwise provided, the provisions of this chapter may be varied by agreement.



## **Article 11. Attribution of data messages**

(1) As between the originator and the addressee, a data message is deemed to be that of the originator if it was communicated by the originator or by another person who had the authority to act on behalf of the originator in respect of that data message.

(2) As between the originator and the addressee, a data message is presumed to be that of the originator if the addressee, by properly applying a procedure previously agreed to by the originator, ascertained that the data message was that of the originator. [[??]]

(3) Where paragraphs (1) and (2) do not apply, a data message is [deemed] [presumed] to be that of the originator if:

(a) 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; or

(b) the addressee ascertained that the data message was that of the originator by a method which was reasonable in the circumstances.

However, subparagraphs (a) and (b) do not apply if 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.

(4) Where a data message is deemed or presumed to be that of the originator under this article, the content of the data message is presumed to be that received by the addressee. However, where transmission results in an error in the content of a data message or in the erroneous duplication of a data message, the content of the data message is not presumed to be that received by the addressee in so far as the data message was erroneous, if the addressee knew of the error or the error would have been apparent, had the addressee exercised reasonable care or used any agreed procedure to ascertain the presence of any errors in transmission.

(5) Once a data message is deemed or presumed to be that of the originator, any further legal effect will be determined by this Law and other applicable law.

## **Article 12. Acknowledgement of receipt**

(1) This article applies where, on or before sending a data message, or by means of that data message, the originator has requested an acknowledgement of receipt.

(2) Where the originator has not requested that the acknowledgement be in a particular form, the request for an acknowledgement may be satisfied by any communication or 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 that acknowledgement, the data message has no legal effect 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:

(a) the originator may give notice to the addressee stating that no acknowledgement has been received and specifying a time, which must be reasonable, by which the acknowledgement must be received; and

(b) if the acknowledgement is not received within the time specified in subparagraph (a), the originator may, upon notice to the addressee, treat the data message as though it had never been transmitted, or exercise any other rights it may have.

(5) Where the originator receives an acknowledgement of receipt, it is presumed that the related data message was received by the addressee. 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.

### **Article 13. 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 14. Time and place of dispatch and receipt of data messages**

(1) Unless otherwise agreed between the originator and the addressee of a data message, the dispatch of a data message occurs when it enters an information system outside the control of the originator.

(2) Unless otherwise agreed between the originator and the addressee of a data message, 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 such data messages, receipt occurs at the time when the data message enters the designated information system, but if the data message is sent to an information system of the addressee that is not the designated information system, receipt occurs 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 received under paragraph (4).

(4) Unless otherwise agreed between the originator and the addressee of a computerized transmission of a data message, a data message is deemed to be received at the place where the addressee has its place of business, and is deemed to be dispatched at the place where the originator has its place of business. For the purposes of this paragraph:

(a) if the addressee or the originator 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 addressee or the originator does not have a place of business, reference is to be made to its habitual residence.

(5) Paragraph (4) shall not apply to the determination of place of receipt or dispatch for the purpose of any administrative, criminal or data-protection law. [[?]]

## ***Cybernews Volume 1, numéro 1 ( hiver 1995 )***

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