

INTEGRATION OF THE ELECTRONIC COMMERCE CONVENTION AND THE CISG

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INTRODUCTION

- ▶ Electronic trade part of our lives
- ▶ Perceived legal uncertainties
- ▶ No provisions in the CISG
 - Telegram, telex
- ▶ UNCITRAL
 - CISG success
 - Electronic trade 1990's
- ▶ Technological convergence 2000's

Example

A, the CEO of a Dutch company is in India at a trade fair. He initiates negotiations with K, a salesperson of a Korean company. K sends an email with an offer for US\$ 500 per widget to A. On his trip A stays over in Johannesburg and reads the email which had been in his inbox for 5 days while he was on safari.

A decides to immediately order a 1,000 but instead of 1,000 types in 10,000 on his smartphone. K starts to implement the order.



CISG and Electronic Trade

- ▶ CISG adopted before electronic era
- ▶ Freedom of form Art 11
 - Few exceptions requiring writing
- ▶ Art 13 – Deemed writing
 - Telegram and telex
- ▶ No signature requirement
- ▶ Art 6 – Party autonomy
 - Parties may require formalities
- ▶ CISG Advisory Council Opinion No 1 (2002)
 - Art 13 flexible enough to incorporate electronic communications

UNCITRAL Instruments

- ▶ Perceived legal uncertainty
- ▶ Model Law on Electronic Commerce (1996)
 - Harmonization of domestic transactions
- ▶ Model Law on Electronic Signatures (2001)
- ▶ Convention on the Use of Electronic Communications in International Contracts (ECC) (2005) – 1/3/2013
 - Harmonization of international transactions
- ▶ Promoting Confidence in Electronic Commerce: Legal Issues on International Use of Electronic Authentication and Signature Methods (2009)
- ▶ Electronic transferable records (????)

ECC Scope – Location of Parties

- ▶ Scope Art 1
 - Parties with places of business in ECC countries
 - Conflicts rules lead to ECC country
- ▶ Place of business – Art 6
 - Location of servers fortuitous
 - Art 6 – physical place of business
 - Usual place of residence
- ▶ Coherence in scope between CISG and ECC

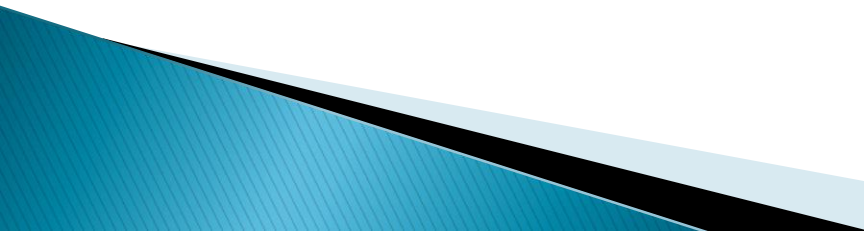
Writing

- ▶ Purpose of formalities
- ▶ CISG and freedom of form
- ▶ Party autonomy (CISG Art 6, ECC Art 3)
- ▶ CISG Art 13 – deemed writing
- ▶ **ECC Art 9**
 - **No formalities required**
 - **Where required, electronic communication sufficient if accessible for future reference**
- ▶ Provides clarity about sufficiency
- ▶ CISG AC Opinion No 1 – confirmed

Electronic signature

- ▶ Greatest hurdle
- ▶ Three approaches
 - Minimalist
 - Technology specific
 - Two-pronged approach
- ▶ **ECC – minimalist approach**
- ▶ CISG no signature requirement
- ▶ Party autonomy – may require signature
 - Standard terms
 - Non-variation clauses
- ▶ NY Convention 1958

Non-variation Clauses

- ▶ International trade and formalities
 - Need for flexibility
 - Modifications
 - ▶ Non-variation clauses
 - Requiring formalities
 - Problematic where signature required
 - ▶ No solution in the ECC
 - ▶ Traders should consider removing needless formalities requirements from standard terms
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Mistake

- ▶ Interpretation of statements/conduct (Art 8)
- ▶ ECC Art 12 – validity of automated systems
- ▶ **ECC Art 14 – errors in electronic communications**
 - Lack of method to review message
 - Notification as soon as possible
 - No material benefit
- ▶ Claim for damages

Conclusion

- ▶ ECC aimed at augmenting CISG and other instruments
- ▶ Does so successfully
- ▶ Consider ratification of the ECC
 - Greater legal certainty
 - More specific rules
- ▶ Provides sensible solutions