

Vienna 16-20 October 2023

**Report on the 66th United Nations Commission on International Trade Law
(UNCITRAL) Working Group IV Session
16-20 October 2023**

The Moot Alumni Association (MAA) report following the 66th Working Group IV
Session¹

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1. Introduction, opening of the session, and the current mandate

The session was attended by representatives of Member States, observers from various States, and observers from international organizations, both intergovernmental organizations, and international non-governmental organizations, including the Moot Alumni Association.

Topics before the Working Group

- A. An annotated provisional agenda.
 - I. A note by the Secretariat, including a second revision of draft provisions on automated contracting.
 - II. A note by the Secretariat, including a first revision of draft default rules for data provision contracts.
- B. The Working Group adopted in its agenda, among other topics:
 - I. Opening the session and scheduling of meetings;
 - II. The use of artificial intelligence and automation in contracting;
 - III. Data provision contracts.

2. Setting out the progress of the session and reform solutions

As a matter of procedure, the Working Group stated that it is beyond the scope of its mandate to work on a consolidated version of the above drafts. The Working Group also pointed out that it would recommend the Commission to consider this proposal of a consolidated version 'draft' in its next 57th session.

3. Substantive Discussions

¹ All quotations contained in this report are sourced from A/CN.9/1162 - Report of Working Group IV (Electronic Commerce) on the work of its sixty-sixth session.

A. On the ‘Draft Provisions on Automated Contracts’

Comments and suggestions on this draft were provided for by several delegates, including the representatives of the Russian Federation, Spain, France, Germany, Panama, the USA, Mexico, Singapore, and Austria. These comments dealt with, among other issues, the definition of some legal terms, particularly the definition of an automated system, data message, performance and termination of a contract, and the use of artificial intelligence in contracting. The UNCITRAL Secretariat provided practical clarifications that are based on requests made by representatives of some Member States on salient pertinent legal issues of this draft.

The use of automated systems: ‘It was suggested that principle 1 should clarify that automated systems may be used in only one stage or in multiple stages of the contract life cycle, and therefore with varying degrees of human intervention’. On this matter, ‘broad support was expressed for greater clarity on the use of automated systems in connection with the termination of contracts’, considering that ‘the contract termination fell within the broad meaning of ‘contract performance’ stipulated in the explanatory note (Paragraph 55) of the UN Convention on the Use of Electronic Communications in International Contracts (‘ECC’). Based on those assertions, ‘it was suggested that the explanatory material on principle 1 should expressly refer to the use of automated systems in connection with contract termination’.

The definition of ‘automated systems’: Several suggestions have been presented by distinguished delegates of participating countries on the necessity to revise the definition of ‘automated systems’, including, but not limited to, the need to replace the words ‘determinative and non-determinative’ with ‘systems based particularly on artificial intelligence’.

The use of artificial intelligence and automation in contracting: An amendment has been made to A/CN.9/WG.IV/LXVI/CRP.1/Add.1, at the end of the paragraph 1, ‘It was clarified that the principles were concerned with the use of automation in contracting and not the use of automated systems to assist in contract management (e.g. the use of an AI system to generate contract terms’. Moreover, an amendment has been made to A/CN.9/WG.IV/LXVI/CRP.1/Add.2, as ‘it was generally felt that issues addressed in principle 6 deserved further consideration’. The Working Group requested the Secretariat to redraft this principle in light of its deliberations.

Legal recognition: Considering the concerns raised during the meetings as to the absence of a reference to the validity of contracts formed without human intervention, which may ‘reduce the effectiveness of paragraph (a) of principle 2 as a restatement of article 12 of the ECC’. The Working Group considered a revised version of Paragraph (d) of Principle 2 as follows: ‘[by an automated system shall not be denied legal effect, validity or enforceability on the sole ground that the information [originated in a source] that changes periodically or continuously.’

B. On the ‘Draft Default Rules for Data Provision Contracts’: Preliminary

Comments and suggestions on this draft were made by respected delegates, including representatives of Spain, France, Germany, the USA, Iran, and Singapore. These comments

dealt with, among other issues, the definition of topics included in data provision, data access for economic purposes, and using a process that allows the data recipient to receive the data from the provider. The Secretariat of the UNCITRAL made some clarifications that is based on requests made by representatives of some Member States on salient pertinent legal and practical issues of this draft Default Rules.

The difference between Sales Contracts and Data Provision Contracts: The Working Group indicated that there is a significant difference between the UN Convention on Contracts for the International Sale of Goods (‘CISG’), and Data Provision Contracts. Therefore, The Working Group determined that, while the CISG apply to Sales Contracts, the Default Rules on Data Provision Contracts apply a variety of contractual arrangements for transactions in data.

The Mode of Provision: Requiring the data to only be accessible was insufficient, therefore, an amendment has been made on Article 5 to cover both the active ‘transfer’ and the passive ‘access’ provision of data. Based on the above, the following options were put forward:

- a. To require the data provider to ‘provide the data by any means that facilitates access to the data or makes the data available to the data recipient’.
- b. To state that data was ‘made available or accessible’ where ‘data or any means suitable for accessing or downloading it has reached the sphere of the data recipient and no further actions is required by the data provider to enable the data recipient to access it in accordance with the contract’.

Conformity of Data: Under Article 7, ‘it was suggested [under Paragraph 1] that the characteristics of data should not be listed exhaustively’. Also, ‘it was observed that the conformity requirements applied exhaustively, [but] not cumulatively’, and therefore, it was suggested under Paragraph 2 that ‘fitness for ordinary purpose be reinserted, and that the requirement in subparagraph (d) be recast as a stand-alone provision’. In addition, it was suggested, and agreed by the Working Group, that Paragraphs 4 and 5 that deal with matters relating to remedies should be moved to article 10.

The Use of Provided Data: The Working Group agreed to insert a provision on the application of the default rules in Article 3, noting that all default rules applied absent an agreement of the parties. In that, support was expressed to include a provision under Article 8 on the use of data upon expiration of the term or termination of the contract.

4. Conclusions/Reflections

The Working Group, with respect, has not referred, either directly or indirectly, to smart contracts, which might be an integral part of automated contracting. The Working Group averred from certain topics including ‘Internet of Things’. Additionally, the Working Group has dealt with the requirement of machine readability and suitability for automated processing but has not referred to machine learning.