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## **Uniform law on electronic contracts as a step forward in elimination barriers of electronic commerce**

### **I.**

#### **Preliminary issues**

Electronic commerce has an important impact on economy<sup>1</sup> and our every day life. What is important, it does not know geographical borders<sup>2</sup>. However, development of electronic commerce is a challenge to the laws of individual states and the international community<sup>3</sup>. The legal framework for international business transactions are established through legal instruments in the field of public law. This legal framework tends to a gradual reduction of tariff and non-tariff barriers in international trade<sup>4</sup>. Creation of free trade zones or other forms of international cooperation affects the increase of private law relationships with foreign elements. It should be notated that international commercial turnover materializes on the basis of private legal relationships (mainly contract law). Acts of public law, especially public international law,

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<sup>1</sup> Vide J. E. Prieger, D. Heil, *The Microeconomic Impacts of E-Business on the Economy* (May 20, 2009), p. 4 and next. Available at SSRN: <https://ssrn.com/abstract=1407713> or <http://dx.doi.org/10.2139/ssrn.1407713> [access 08.01.2017].

<sup>2</sup> Vide G. Alaveras, B. Martens, *International Trade in Online Services* (October 7, 2015), p. 4. Available at SSRN: <https://ssrn.com/abstract=2670614> or <http://dx.doi.org/10.2139/ssrn.2670614> [access 08.01.2017].

<sup>3</sup> Vide A. Endeshaw, *The Law vis-à-vis Electronic Commerce* [in:] *Electronic Commerce: Opportunity and Challenges: Opportunity and Challenges*, Londyn 2000, p. 362.

<sup>4</sup> M. Cook, *The changing nature of international business* [in:] *International Business Economics. A European Perspective*, ed. by M. Cook, J. Pigott, New York 2006, p. 5.

constitute only a framework within which international trade operates, regulating by private law institutions<sup>5</sup>.

In this paper, it is considered, whether there is a need to adopt uniform law on electronic contracts. Study is going to assess existing acts on contract law applicable to contracts with foreign element (international contracts), including those adopted under the auspices of United Nations Commission on International Trade<sup>6</sup>. Particular attention is also paid to the close relationship between the acts of uniform law and the ways of dispute resolution arising out of contracts in international commercial turnover. It should be also stressed that the legal framework can be a stimulating or limiting factor from international trade perspective. This paper attempts to answer the question to what extent the adoption of uniform rules regarding contracts in electronic commerce could contribute to the intensification of commerce or lead to reduce transaction costs of its functioning.

## II.

### UNCITRAL legal framework on electronic commerce

Under UNCITRAL auspices has been adopted legal instruments that play relevant role in international trade. The most important of them are United Nations Convention on Contracts for the International Sale of Goods, adopted 11 April 1980 in Vienna<sup>7</sup> and United Nations Convention on the Use of Electronic Communications in International Contracts, adopted 23 November 2005 in New York<sup>8</sup>. The key question, having in mind subject of this study, is whether these acts can be used and to what extent to electronic contracts?

CISG applies to agreements on delivery and sale of goods<sup>9</sup>. CISG does not apply if the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services<sup>10</sup>. Having this in mind, and circumstance that contracts on services play significant role form a current trading practice, CISG practical importance in the field of

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<sup>5</sup> P. Rodziewicz, *Stwierdzenie treści oraz zastosowanie prawa obcego w sądowym postępowaniu cywilnym*, Warszawa 2015, p. 2.

<sup>6</sup> Hereinafter: „UNCITRAL”.

<sup>7</sup> Hereinafter: „CISG”.

<sup>8</sup> Hereinafter: „CUECIC”.

<sup>9</sup> *Vide* article 3 (1) CISG.

<sup>10</sup> *Explanatory Note by the UNCITRAL Secretariat on the United Nations Convention on Contracts for the International Sale of Goods*. Text available on: <http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf> [access 08.01.2017].

electronic commerce is declining. On the other hand, there should be noted, that in time when CISG was drafted Internet was in its infancy and it was really hard to suppose the scale of its future development. As doctrine indicated, there is no clear regulation in the CISG directly relating to electronic contracts<sup>11</sup>. However, there should be paid attention to the Opinion No 1 of CISG – Advisory Council<sup>12</sup> on Electronic Communications Under CISG<sup>13</sup>. According to which provisions of CISG (especially articles 11, 12, 13, 21, 29 and 96 of CISG) shall be interpreted in manner that allowing use of an electronic means of communication<sup>14</sup>. Thus, CISG may be applicable to electronic contracts. However, it should be point out that electronic contracts are contracts concluded by means of electronic communication, and contracts in which performance shall be fulfilled electronically. CISG may be applicable only to the first group of contracts. Because subject of performance in contracts under CISG can not be provision of digital content or services. In conclusion CISG can be applied to electronic contracts, nevertheless, it will not cover the majority of contracts normally functioning in e – commerce, which subject is digital content or services.

Broader scope of application than CISG has potentially CUECIC. According to article 1 par. 1 CUECIC, it shall apply to the use of electronic communications in connection with the formation or performance of a contract between parties whose places of businesses are in different states. In connection with the above, CUECIC applies to contracts usually concluded within the framework of e – commerce like contracts for services, licenses of software, auctions, barter, and other types of transactions, as well as sale of goods<sup>15</sup>. Regulation contained in CUECIC does not cover all issues concerned with electronic contract. Therefore, to the extent not regulated by the CUECIC, it is necessary to refer to other relevant regulations like CISG, in case

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<sup>11</sup> J. E. Hill, *The Future of Electronic Contracts in International Sales: Gaps and Natural Remedies under the United Nations Convention on Contracts for the International Sale of Goods*, 2 Nw. J. Tech. & Intell. Prop. 1 (2003), p. 5. Available on <http://scholarlycommons.law.northwestern.edu/njtip/vol2/iss1/1> [access 08.01.2017].

<sup>12</sup> The CISG – Advisory Council is an initiative supported by the Institute of International Commercial Law at Pace University School of Law and the Centre for Commercial Law Studies, Queen Mary, University of London. Main aim of CISG – Advisory Council is to support understanding of the CISG and the promotion and assistance in the uniform interpretation of the CISG - <http://www.jus.uio.no/pace/cisg-ac-op1/portrait.pdf> [access 08.01.2017].

<sup>13</sup> *CISG-AC Opinion no 1, Electronic Communications under CISG, 15 August 2003*. Rapporteur: Professor Christina Ramberg, Gothenburg, Sweden. Adopted by the CISG-AC with no dissent. Text available: <http://www.jus.uio.no/pace/cisg-ac-op1/portrait.pdf> [access 08.01.2017].

<sup>14</sup> Ch. H. Martin, *The Electronic Contracts Convention, the CISG, and New Sources of E-Commerce Law*. *Tulane Journal of International & Comparative Law*, Vol. 16, No. 2, Spring 2008, p. 475. Available at SSRN: <https://ssrn.com/abstract=1120333> [access 08.01.2017].

<sup>15</sup> Ch. H. Martin, *The Electronic... op. cit.*, p. 470. Available at SSRN: <https://ssrn.com/abstract=1120333> [access 08.01.2017].

of sale or delivery of goods or national acts on contract law. Reference to national law, in the case of electronic contracts connected with laws of more than one state, requires the prior application of the relevant conflict of laws rule (private international law) in order to determine law applicable. Of course, basic and widely adopted principle in determining the law applicable to contractual obligations is the choice of law principle<sup>16</sup>. This principle allows contracting parties to indicate law applicable to contractual obligations linking them. The biggest drawback of CISG and CUECIC is that they apply only to relations between entrepreneurs. Meanwhile, more and more electronic contracts with foreign element is concluded between entrepreneurs and consumers. It has to be emphasized that vast majority of the electronic contracts are contracts for low-value benefits, concluded on a massive scale and by entrepreneurs with consumers, as highlighted in the course of the work of UNCITRAL Working Group III on Online Dispute Resolution<sup>17</sup>.

In conclusion, described legal instruments adopted under UNCITRAL auspices may constitute legal framework for electronic contracts but only between professionals. Moreover, due to the fact that said conventions do not cover contracts concluded by entrepreneurs with consumers, and that they do not contain an exhaustive regulation concerning contracts relating to the provision of services or supply of digital content, it seems that the practical utility of this acts in regulation of electronic commerce is very little.

### III.

#### **Attempts to adopt uniform legal framework on electronic contracts in EU**

Within the European Union there were voices, for a long time, concerning need for unification of contract law, which would result in the elimination of barriers to the functioning of the internal common market. European Commission issued Green Paper on policy options for progress towards an European Contract Law for consumers and businesses on 01.07.2010

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<sup>16</sup> G. Ruhl, *Party Autonomy in the Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency*. CLPE Research Paper No. 4/2007; Conflict of Laws in a Globalized World, Eckart Gottschalk, Ralf Michaels, Giesela Rühl & Jan von Hein, eds., Cambridge University Press, p. 4. Available at SSRN: <https://ssrn.com/abstract=921842> [access 08.01.2017].

<sup>17</sup> *Vide* A/CN.9/WG.III/WP.104 - *Annotated provisional agenda*, p. 4. Text available: <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V10/559/93/PDF/V1055993.pdf?OpenElement> [access 08.01.2017].

[COM(2010)348 final]<sup>18</sup>. Green Paper assumed the adoption of a regulation which could set up an optional instrument, which would be conceived as a "2nd Regime" of contract law in each Member State of EU, thus providing parties with an option between two regimes of domestic contract law<sup>19</sup> or "28<sup>th</sup> Contract Regime" in EU, which parties may choose as law applicable<sup>20</sup>. One year later European Commission presented Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law<sup>21</sup> (COM(2011) 635 final)<sup>22</sup>. Ultimately the work carried out within the framework of the European Union have not led to the adoption of CESL. European Commission announced modification of proposal on CESL in December 2014<sup>23</sup>. Instead CESL there were launched two proposals for directives, which in its scope of regulation relate to the issues covered by CESL: Proposal for a Directive of the European Parliament and of the council on certain aspects concerning contracts for the supply of digital content (COM(2015) 634 final)<sup>24</sup> and Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods (COM(2015) 635 final)<sup>25</sup>. Drafts of directives have different scope of regulation, the first one concerns consumer contracts having as their object the delivery of digital content and the second one concerns sales contracts. European Commission indicated in communication to the European Parliament, The Council and the European Economic and Social Committee that setting the creation of a Digital Single Market is one of its key priorities to generate additional growth in Europe. Adopted strategy on the Digital Single Market tackles all major obstacles to

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<sup>18</sup> Text available: <http://ec.europa.eu/transparency/regdoc/rep/1/2010/EN/1-2010-348-EN-F1-1.Pdf> [access 08.01.2017].

<sup>19</sup> *Vide Green paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses* - COM(2010)348 final. Text available on <http://ec.europa.eu/transparency/regdoc/rep/1/2010/EN/1-2010-348-EN-F1-1.Pdf> [access 08.01.2017].

<sup>20</sup> M. Fornasier, »28.« versus »2. Regime« – *Kollisionsrechtliche Aspekte eines optionalen europäischen Vertragsrechts (28th versus 2nd Regime – An Optional European Contract Law from a Choice of Law Perspective)* (July 6, 2011). *Rabel Journal of Comparative and International Private Law (RabelsZ)*, Vol. 76, No. 2, , April 2012, p. 406; DOI: 10.1628/003372512800133453; Max Planck Private Law Research Paper No. 11/10. Available at SSRN: <https://ssrn.com/abstract=1881510> [access 08.01.2017].

<sup>21</sup> Hereinafter: „CESL”.

<sup>22</sup> Text available: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0635:FIN:en:PDF> [access 08.01.2017].

<sup>23</sup> Text available: [http://ec.europa.eu/atwork/pdf/cwp\\_2015\\_withdrawals\\_en.pdf](http://ec.europa.eu/atwork/pdf/cwp_2015_withdrawals_en.pdf) [access 08.01.2017].

<sup>24</sup> Text available: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52015PC0634&from=EN> [access 08.01.2017].

<sup>25</sup> Text available: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52015PC0635&from=EN> [access 08.01.2017].

the development of cross border e – commerce in the EU<sup>26</sup>. In conclusion, a uniform rules on contract law have not been adopted in the European Union. There are ongoing legislative works aimed at harmonizing the national legal systems of EU Member States. Drafted directives certainly do not aim to create a coherent regulation on electronic contracts. It should be remembered that the extent not covered by the directives (harmonized), in each Member State will apply national rules on contract law, which may differ one from another.

#### IV.

#### **“Internet of things” new challenge for contract law**

Considerations on electronic contracts shall take into account not only the current state of social relations, information technologies and regulations which are in force, but also shall include existing trends, which show how our reality might look like in 5 or 10 years. In this context regulation on electronic contracts shall take into consideration phenomenon called „Internet of things”<sup>27</sup>. As indicated in the literature: „in the future, the Internet is also likely to be increasingly used to link devices, machines, and other objects, or – in the vernacular – things, over wired and wireless networks using Internet protocol”<sup>28</sup>. Therefore, it should be reviewed, whether the existing regulations on contract law will be able to properly regulate the indicated phenomenon. It is possible that current regulations are insufficient and they will have to be changed or there will be a need to adopt additional appropriate legal framework. It should be noted that the IoT generate not only a problems relevant from a private law point of view, like contract law, but it cover also issues form a field of public law, like data protection etc<sup>29</sup>. *Prima facie*, when it comes to services within the IoT particular importance seems to play contract law provisions concerning performance of obligation and liability for non-performance or improper performance of obligation, where it can take place in a much greater extent without human intervention but based on failure of automatic mechanisms, which are not directly the

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<sup>26</sup> *Digital contracts for Europe - Unleashing the potential of e-commerce* - COM(2015) 633 final. Text available on <http://ec.europa.eu/justice/contract/files/communication.pdf> [access 08.01.2017].

<sup>27</sup> Hereinafter: „IoT”.

<sup>28</sup> W.H. Dutton, *The Internet of Things* (June 20, 2013), p. 8. Available at SSRN: <https://ssrn.com/abstract=2324902> or <http://dx.doi.org/10.2139/ssrn.2324902> [access 08.01.2017].

<sup>29</sup> S.R. Peppet, *Regulating the Internet of Things: First Steps Toward Managing Discrimination, Privacy, Security & Consent* (March 1, 2014), p. 8. *Texas Law Review*, Forthcoming. Available at SSRN: <https://ssrn.com/abstract=2409074> [access 08.01.2017].

consequence of a defective human behaviour. Adaptation of existing legislation to developing the IoT seem to be indispensable, as indicated in literature, the number of developers of IoT in 2020 reached nearly 4.5 million<sup>30</sup> and this phenomenon is going to have a great impact on economy.

In conclusion, on international level shall be adopted proper legal framework for IoT, among others relevant provisions on contract law. It should be stressed at this point that the IoT does not know the boundaries in geographical sense, the same like e – commerce, therefore it is highly recommended to adopt appropriate regulations on an international scale.

## V.

### **Adoption of uniform contract law and dispute resolution**

Adoption of uniform legal instrument on electronic contracts seem to be in close relation with the dispute resolution arising out of e – commerce transactions. UNCITRAL Working Group III noted that a significant part of electronic contracts are low – value, massively concluded with consumers<sup>31</sup>. As indicated UNCITRAL Working Group III work: *„many delegations supported the approach of using equitable principles, codes of conduct, uniform generic rules or sets of substantive provisions — bearing in mind the need for a high consumer protection content — as the basis for deciding cases, thus avoiding complex problems that may arise in the interpretation”*<sup>32</sup>. Adoption of uniform rules on electronic contracts would streamline and accelerate procedures to resolve disputes arising from the above mentioned contracts. Dispute settlement body would render a decision basing on uniform electronic contract law, the same it has not to determine law applicable in cases concerning disputes arising out of electronic contracts connected with law of more than one state. Introduction of a uniform contract law would simplify and speed up proceedings concerning claims arising from them and ensure better

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<sup>30</sup> A.D. Thierer, *The Internet of Things and Wearable Technology: Addressing Privacy and Security Concerns without Derailing Innovation* (February 18, 2015). Adam Thierer, *The Internet of Things and Wearable Technology: Addressing Privacy and Security Concerns without Derailing Innovation*, 21 RICH. J.L. & TECH. 6 (2015), p. 14. Available at SSRN: <https://ssrn.com/abstract=2494382> or <http://dx.doi.org/10.2139/ssrn.2494382> [access 08.01.2017].

<sup>31</sup> A/CN.9/WG.III/WP.105 - *Online dispute resolution for cross-border electronic commerce transactions*, p. 4. Text available: <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V10/574/10/PDF/V1057410.pdf?OpenElement> [access 08.01.2017].

<sup>32</sup> A/CN.9/WG.III/WP.115 - *Analysis and Proposal for Incorporation of Substantive Principles for ODR Claims and Relief into Article 4 of the Draft Procedural Rules*, p. 3. Text available: <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V12/516/02/PDF/V1251602.pdf?OpenElement> [access 08.01.2017].

and more effective protection to consumers. Application of uniform contract law can result in greater predictability and certainty of decisions, regardless of which state entrepreneur is directed his business activity in comparison to the current situation, where each country, as a rule, have different provisions on electronic contracts. This applies in particular to contracts concluded with consumers, because ability to choose the law applicable to such contracts is limited. Law applicable for consumer contracts, as a rule, is the law of the habitual residence of the consumer, example can be art. 6 EU Regulation Rome I<sup>33</sup>. The above means that, if entrepreneur directs its business activity to consumers, who have their habitual residence in different countries, different laws might be applicable for each of the concluded contract. This results in increase costs related to business activity associated with the need to adapt contracts with consumers to different laws applicable for them. Introduction of uniform rules would allow to reduce this costs and at the same time provide uniform standard for consumer's protection on international level in reference to electronic contracts.

## **VI.**

### **Scope of legal instrument on uniform contract law**

Uniform law on electronic contracts should cover all important issues usually constituting the subject matter of contract law. Therefore, a uniform law should regulate the following issues: conclusion of the contract, form of the contract, performance of an obligation, default or improper performance of the obligation, disclosure requirements, withdrawal, interests, limitation of claims following from a contract. Except main general issues on electronic contracts, legal instrument should include specific provisions concerning basic types of contracts in electronic commerce from which the most important role play contracts on provision of services and delivery of digital content. Scope of regulation of legal instrument on electronic contracts shall be determined after a broad discussion on the latest trends related to the development of electronic commerce and tendencies associated with the development of new technologies. As indicated above act on electronic contracts shall anticipated trends and developments, which soon may

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<sup>33</sup> *Vide Z.S. Tang, Electronic Consumer Contracts in the Conflict of Laws*, 2nd Edition, Oxford and Portland 2015, p. 162.

become part of our every day reality, as an example may be refer phenomenon, that has been already discussed, concerning IoT.

## VII.

### **Uniform law on electronic contracts and transactional costs incurred by entrepreneurs**

Referring to the concept of transaction costs created by Ronald Coase<sup>34</sup> and developed by Oliver Williamson<sup>35</sup>, adoption uniform legal instrument on electronic contracts can help to reduce the transaction costs of the entrepreneur, which are one of the barriers in business activity. Transactional costs incurred by entrepreneurs associated with their activities can be divided into three groups: cost of collecting information about the market, market research, search for offers, analysis of demand and supply etc.; management costs and contracting costs - costs of negotiations, procedural costs, costs of provisioning; costs of control – costs of monitoring and execution of contracts, losses resulting from failed transactions and wasted opportunities<sup>36</sup>. Introduction of a uniform legal instrument on electronic contracts in relation to entrepreneurs who operate on a several national markets could contribute to reducing both cost of management, contracting and cost of control. This means that the introduction of a uniform instrument on electronic contracts will not only ensure a higher and uniform level of consumer protection regardless of their country of habitual residence, but also tend to reduce the transactional costs associated with the entrepreneur's business activity, who will no longer be obliged to conduct its activity in accordance with several different contract law regimes (depending on the place of consumer habitual residence).

## VIII.

### **Conclusions**

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<sup>34</sup> G. Jayasurya, Ronald Coase's *Contribution to Law and Economics* (August 6, 2010), p. 5. Available at SSRN: <https://ssrn.com/abstract=1654609> or <http://dx.doi.org/10.2139/ssrn.1654609> [access 08.01.2017].

<sup>35</sup> E. Bertrand, *Institutional Economics* [in:] Handbook on the History of Economic Analysis Volume III: Developments in Major Fields of Economics, ed. by G. Faccarello, H.D. Kurz, Cheltenham 2016, p. 320.

<sup>36</sup> Vide P.K. Rao, *The Economics of Transaction Costs: Theory, Methods and Application*, Nowy jork 2003, p. 7 and next.

As indicated in this paper, there is a lack of an international legal instrument which in a comprehensive manner govern electronic contracts. The introduction of such an act could help to ensure a uniform and enhanced level of consumer protection, reduce transactional costs incurred by entrepreneurs, as well as the accelerate and simplify procedures intended to settle disputes arising out of electronic contracts, which are connected with law of at least two states. It should be also stressed, that the continuous development of new technology forces need for development of a legal framework to ensure the fair distribution of rights and responsibilities, as well as risks related to the concluded contracts between the parties. Bearing in mind the UNCITRAL achievements in the field of unification regulations relevant from an international trade perspective, it is reasonable to express the opinion that UNCITRAL is the best forum in which adoption of uniform act on electronic contracts can become a reality. Moreover, it should be underlined that UNCITRAL range of activity qualifies it to take such action, in particular, not a regional, but global scale of UNCITRAL. As I have repeatedly emphasized the work on the law of electronic contracts should cover not only the existing phenomena and trends, but also this concepts, which are going to be crucial and play significant role in future, like for example IoT<sup>37</sup>.

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<sup>37</sup> *Vide* F. Khodadadi, A.V. Dastjerdi, R. Buyya [in:] *Internet of Things: Principles and Paradigms*, ed. by R. Buyya, A. V. Dastjerdi, Elsevier Inc. 2016, p. 18.