# Explanatory note by the UNCITRAL secretariat on the United Nations Convention on the Use of Electronic Communications in International Contracts*

## I. Introduction

1. The United Nations Convention on the Use of Electronic Communications in International Contracts (hereinafter the "Electronic Communications Convention" or the "Convention") was prepared by the United Nations Commission on International Trade Law (UNCITRAL) between 2002 and 2005. The General Assembly adopted the Convention on 23 November 2005 by its resolution 60/21 and the Secretary-General opened it for signature on 16 January 2006.

2. When it approved the final draft for adoption by the General Assembly, at its thirty-eighth session (Vienna, 4-15 July 2005), UNCITRAL requested the Secretariat to prepare explanatory notes on the new instrument. At its thirty-ninth session (New York, 19 June-7 July 2006), UNCITRAL took note of the explanatory notes prepared by the Secretariat and requested the Secretariat to publish the notes together with the text of the Convention.

## II. Main features of the Convention

3. The purpose of the Electronic Communications Convention is to offer practical solutions for issues related to the use of electronic means of communication in connection with international contracts.

4. The Convention is not intended to establish uniform rules for substantive contractual issues that are not specifically related to the use of electronic communications. However, a strict separation between technology-related and substantive issues in the context of electronic commerce is not always feasible or desirable. Therefore, the Convention contains a few substantive rules that extend beyond merely reaffirming the principle of functional equivalence where substantive rules are needed in order to ensure the effectiveness of electronic communications.

*The present explanatory note has been prepared by the secretariat of the United Nations Commission on International Trade Law (UNCITRAL) for information purposes. It is not an official commentary on the Convention.

## *A. Sphere of application (articles 1 and 2)*

5. The Electronic Communications Convention applies to the "use of electronic communications in connection with the formation or performance of a contract between parties whose places of business are in different States". "Electronic communication" includes any statement, declaration, demand, notice or request, including an offer and the acceptance of an offer, made by electronic, magnetic, optical or similar means in connection with the formation or performance of a contract. The word "contract" in the Convention is used in a broad way and includes, for example, arbitration agreements and other legally binding agreements whether or not they are usually called "contracts".

6. The Convention applies to international contracts, that is, contracts between parties located in two different States, but it is not necessary for both of those States to be contracting States of the Convention. However, the Convention only applies when the law of a contracting State is the law applicable to the dealings between the parties, which is to be determined by the rules on private international law of the forum State, if the parties have not validly chosen the applicable law.

7. The Convention does not apply to electronic communications exchanged in connection with contracts entered into for personal, family or household purposes. However, unlike the corresponding exclusion under article 2 *(a)* of the United Nations Convention on Contracts for the International Sale of Goods[1] (the "United Nations Sales Convention"), the exclusion of these transactions under the Electronic Communications Convention is an absolute one, meaning that the Convention would not apply to contracts entered into for personal, family or household purposes, even if the particular purpose of the contract was not apparent to the other party. Furthermore, the Convention does not apply to transactions in certain financial markets subject to specific regulation or industry standards. These transactions have been excluded because the financial service sector is already subject to well-defined regulatory controls and industry standards that address issues relating to electronic commerce in an effective way for the worldwide functioning of that sector. Lastly, the Convention does not apply to negotiable instruments or documents of title, in view of the particular difficulty of creating an electronic equivalent of paper-based negotiability, a goal for which special rules would need to be devised.

## *B. Location of the parties and information requirements (articles 6 and 7)*

8. The Electronic Communications Convention contains a set of rules dealing with the location of the parties. The Convention does not contemplate a duty for the parties to disclose their places of business, but establishes a certain number of presumptions and default rules aimed at facilitating a determination of a party's location. It attributes primary—albeit not absolute—importance to a party's indication of its relevant place of business.

[1]United Nations, *Treaty Series*, vol. 1489, No. 25567.

9. The Convention takes a cautious approach to peripheral information related to electronic messages, such as Internet Protocol addresses, domain names or the geographic location of information systems, which despite their apparent objectivity have little, if any, conclusive value for determining the physical location of the parties.

## *C. Treatment of contracts (articles 8, 11, 12 and 13)*

10. The Electronic Communications Convention affirms in article 8 the principle contained in article 11 of the UNCITRAL Model Law on Electronic Commerce[2] that contracts should not be denied validity or enforceability solely because they result from the exchange of electronic communications. The Convention does not venture into determining when offers and acceptances of offers become effective for purposes of contract formation.

11. Article 12 of the Convention recognizes that contracts may be formed as a result of actions by automated message systems ("electronic agents"), even if no natural person reviewed each of the individual actions carried out by the systems or the resulting contract. However, article 11 clarifies that the mere fact that a party offers interactive applications for the placement of orders—whether or not its system is fully automated—does not create a presumption that the party intended to be bound by the orders placed through the system.

12. Consistently with the decision to avoid establishing a duality of regimes for electronic and paper-based transactions, and consistent with the facilitative—rather than regulatory—approach of the Convention, article 13 defers to domestic law on matters such as any obligations that the parties might have to make contractual terms available in a particular manner. However, the Convention deals with the substantive issue of input errors in electronic communications in view of the potentially higher risk of mistakes being made in real-time or nearly instantaneous transactions entered into by a natural person communicating with an automated message system. Article 14 provides that a party who makes an input error may withdraw the part of the communication in question under certain circumstances.

## *D. Form requirements (article 9)*

13. Article 9 of the Electronic Communications Convention reiterates the basic rules contained in articles 6, 7 and 8 of the UNCITRAL Model Law on Electronic

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[2]For the text of the Model Law, see General Assembly resolution 51/162 of 16 December 1996, annex. The text is also published in the *Official Records of the General Assembly, Fifty-first Session, Supplement No. 17* (A/51/17), annex I, and in the *UNCITRAL Yearbook*, vol. XXVII:1996 (United Nations publication, Sales No. E.98.V.7), part three, annex I). The Model Law and its accompanying Guide to Enactment have been published as a United Nations publication, Sales No. E.99.V.4, and are available in electronic form on the UNCITRAL website (http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model.html).

Commerce concerning the criteria for establishing functional equivalence between electronic communications and paper documents—including "original" paper documents—as well as between electronic authentication methods and handwritten signatures. However, unlike the Model Law, the Convention does not deal with record retention, as it was felt that such a matter was more closely related to rules of evidence and administrative requirements than to contract formation and performance.

14. It should be noted that article 9 establishes minimum standards to meet form requirements that may exist under the applicable law. The principle of party autonomy in article 3, which is also contained in other UNCITRAL instruments, such as in article 6 of the United Nations Sales Convention, should not be understood as allowing the parties to go as far as relaxing statutory requirements on signature in favour of methods of authentication that provide a lesser degree of reliability than electronic signatures. Generally, it was understood that party autonomy did not mean that the Electronic Communications Convention empowered the parties to set aside statutory requirements on form or authentication of contracts and transactions.

## *E. Time and place of dispatch and receipt of electronic communications (article 10)*

15. As is the case under article 15 of the UNCITRAL Model Law on Electronic Commerce, the Electronic Communications Convention contains a set of default rules on time and place of dispatch and receipt of electronic communications, which are intended to supplement national rules on dispatch and receipt by transposing them to an electronic environment. The differences in wording between article 10 of the Convention and article 15 of the Model Law are not intended to produce a different practical result, but rather are aimed at facilitating the operation of the Convention in various legal systems, by aligning the formulation of the relevant rules with general elements commonly used to define dispatch and receipt under domestic law.

16. Under the Convention, "dispatch" occurs when an electronic communication leaves an information system under the control of the originator, whereas "receipt" occurs when an electronic communication becomes capable of being retrieved by the addressee, which is presumed to happen when the electronic communication reaches the addressee's electronic address. The Convention distinguishes between delivery of communications to specifically designated electronic addresses and delivery of communications to an address not specifically designated. In the first case, a communication is received when it reaches the addressee's electronic address (or "enters" the addressee's "information system" in the terminology of the Model Law). For all cases where the communication is not delivered to a designated electronic address, receipt under the Convention only occurs when *(a)* the electronic communication becomes capable of being retrieved by the addressee (by reaching an electronic address of the addressee) and *(b)* the addressee actually becomes aware that the communication was sent to that particular address.

17. Electronic communications are presumed to be dispatched and received at the parties' places of business.

### *F. Relationship to other international instruments (article 20)*

18. UNCITRAL hopes that States may find the Electronic Communications Convention useful to facilitate the operation of other international instruments—particularly trade-related ones. Article 20 intends to offer a possible common solution for some of the legal obstacles to electronic commerce under existing international instruments in a manner that obviates the need for amending individual international conventions.

19. In addition to those instruments which, for the avoidance of doubt, are listed in paragraph 1 of article 20, the provisions of the Convention may also apply, pursuant to paragraph 2 of article 20, to electronic communications exchanged in connection with contracts covered by other international conventions, treaties or agreements, unless such application has been excluded by a contracting State. The possibility of excluding this expanded application of the Convention has been added to take into account possible concerns of States that may wish to ascertain first whether the Convention would be compatible with their existing international obligations.

20. Paragraphs 3 and 4 of article 20 offer further flexibility by allowing States to add specific conventions to the list of international instruments to which they would apply the provisions of the Convention—even if the State has submitted a general declaration under paragraph 2—or to exclude certain specific conventions identified in their declarations. It should be noted that declarations under paragraph 4 of this article would exclude the application of the Convention to the use of electronic communications in respect of all contracts to which another international convention applies.

## III. Summary of preparatory work

21. At its thirty-third session (New York, 17 June-7 July 2000), UNCITRAL held a preliminary exchange of views on proposals for future work in the field of electronic commerce. The three suggested topics were electronic contracting, considered from the perspective of the United Nations Sales Convention; online dispute settlement; and dematerialization of documents of title, in particular in the transport industry.

22. The Commission welcomed those suggestions. The Commission generally agreed that, upon completing the preparation of the Model Law on Electronic Signatures, the Working Group on Electronic Commerce would be expected to examine, at its thirty-eighth session, some or all of the above-mentioned topics, as

well as any additional topic, with a view to making more specific proposals for future work by the Commission at its thirty-fourth session, in 2001. It was agreed that work to be carried out by the Working Group could involve consideration of several topics in parallel as well as preliminary discussion of the contents of possible uniform rules on certain aspects of the above-mentioned topics.[3]

23. The Working Group considered those proposals at its thirty-eighth session (New York, 12-23 March 2001), on the basis of a set of notes dealing with a possible convention to remove obstacles to electronic commerce in existing international conventions (A/CN.9/WG.IV/WP.89); dematerialization of documents of title (A/CN.9/WG.IV/WP.90); and electronic contracting (A/CN.9/WG.IV/WP.91). The Working Group held an extensive discussion on issues related to electronic contracting (A/CN.9/484, paras. 94-127). The Working Group concluded its deliberations by recommending to the Commission that it should start work towards the preparation of an international instrument dealing with certain issues in electronic contracting on a priority basis. At the same time, the Working Group recommended that the Secretariat be entrusted with the preparation of the necessary studies concerning three other topics considered by the Working Group: *(a)* a comprehensive survey of possible legal barriers to the development of electronic commerce in international instruments; *(b)* a further study of the issues related to transfer of rights by electronic means, in particular rights in tangible goods and mechanisms for publicizing and keeping a record of acts of transfer or the creation of security interests in such goods; and *(c)* a study discussing the UNCITRAL Model Law on International Commercial Arbitration,[4] as well as the UNCITRAL Arbitration Rules,[5] to assess their appropriateness for meeting the specific needs of online arbitration (A/CN.9/484, para. 134).

24. At the thirty-fourth session of the Commission (Vienna, 25 June-13 July 2001), there was wide support for the recommendations made by the Working Group, which were found to constitute a sound basis for future work by the Commission. Views varied, however, as regards the relative priority to be assigned to the different topics. One line of thought was that a project aimed at removing obstacles to electronic commerce in existing instruments should have priority over the other topics, in particular over the preparation of a new international instrument dealing with electronic contracting. The prevailing view, however, was in favour of the order of priority that had been recommended by the Working Group. It was pointed out, in that connection, that the preparation of an international instrument dealing with issues of electronic contracting and the consideration of appropriate ways for removing obstacles to electronic commerce in existing uniform law conventions and trade agreements were not mutually exclusive. The Commission was reminded of the common understanding reached at its thirty-third session that work to be carried out

[3] *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17* (A/55/17), paras. 384-388.

[4] United Nations publication, Sales No. E.95.V.18.

[5] Ibid., Sales No. E.93.V.6.

by the Working Group could involve consideration of several topics in parallel.[6] In order to give States sufficient time to hold internal consultations, the Commission accepted that suggestion and decided that the first meeting of the Working Group on issues of electronic contracting should take place in the first quarter of 2002.[7]

25. At its thirty-ninth session (New York, 11-15 March 2002), the Working Group considered a note by the Secretariat discussing selected issues on electronic contracting, which contained in its annex I an initial draft tentatively entitled "Preliminary draft convention on [international] contracts concluded or evidenced by data messages" (see A/CN.9/WG.IV/WP.95). The Working Group further considered a note by the Secretariat transmitting comments that had been formulated by an ad hoc expert group established by the International Chamber of Commerce to examine the issues raised in document A/CN.9/WG.IV/WP.95 and the draft provisions set out in its annex I (A/CN.9/WG.IV/WP.96, annex).

26. The Working Group considered first the form and scope of the preliminary convention (see A/CN.9/509, paras. 18-40). The Working Group agreed to postpone discussion on exclusions from the Convention until it had had an opportunity to consider the provisions related to location of the parties and contract formation. In particular, the Working Group decided to proceed with its deliberations by first taking up articles 7 and 14, both of which dealt with issues related to the location of the parties (see A/CN.9/509, paras. 41-65). After it had completed its initial review of those provisions, the Working Group proceeded to consider the provisions dealing with contract formation in articles 8 to 13 (A/CN.9/509, paras. 66-121). The Working Group concluded its deliberations on the Convention with a discussion of draft article 15 (A/CN.9/509, paras. 122-125). The Working Group agreed that it should consider articles 2 to 4, dealing with the sphere of application of the Convention, and articles 5 (Definitions) and 6 (Interpretation), at its fortieth session. The Working Group requested the Secretariat to prepare a revised version of the preliminary convention, based on those deliberations and decisions, for consideration by the Working Group at its fortieth session.

27. Furthermore, at the closing of that session, the Working Group was informed of the progress that had been made by the Secretariat in connection with the survey of possible legal obstacles to electronic commerce in existing trade-related instruments. The Working Group noted that the Secretariat had begun the work by identifying and reviewing trade-relevant instruments from among the large number of multilateral treaties that were deposited with the Secretary-General. The Secretariat had identified 33 treaties as being potentially relevant for the survey and analysed possible issues that might arise from the use of electronic means of communication under those treaties. The preliminary conclusions reached by the Secretariat in relation to those treaties were set out in a note by the Secretariat (A/CN.9/WG.IV/WP.94). The Working Group took note of the progress that had

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[6] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), para. 293.

[7] Ibid., para. 295.

been made by the Secretariat in connection with the survey, but did not have sufficient time to consider the preliminary conclusions of the survey. The Working Group requested the Secretariat to seek the views of member and observer States on the survey and the preliminary conclusions indicated therein and to prepare a report compiling such comments for consideration by the Working Group at a later stage. The Working Group requested the Secretariat to seek the views of other international organizations, including organizations of the United Nations system and other intergovernmental organizations, as to whether there were international trade instruments in respect of which those organizations or their member States acted as depositaries that those organizations would wish to be included in the survey being conducted by the Secretariat (A/CN.9/509, para. 16).

28. The Commission considered the Working Group's report at its thirty-fifth session (New York, 17-28 June 2002). The Commission noted with appreciation that the Working Group had started its consideration of a possible international instrument dealing with selected issues on electronic contracting. The Commission reaffirmed its belief that an international instrument dealing with certain issues of electronic contracting might be a useful contribution to facilitate the use of modern means of communication in cross-border commercial transactions. The Commission commended the Working Group for the progress made in that regard. However, the Commission also took note of the varying views that had been expressed within the Working Group concerning the form and scope of the instrument, its underlying principles and some of its main features. The Commission noted, in particular, the proposal that the Working Group's considerations should not be limited to electronic contracts, but should apply to commercial contracts in general, irrespective of the means used in their negotiation. The Commission was of the view that member and observer States participating in the Working Group's deliberations should have ample time for consultations on those important issues. For that purpose, the Commission considered that it might be preferable for the Working Group to postpone its discussions on a possible international instrument dealing with selected issues on electronic contracting until its forty-first session, to be held in New York from 5 to 9 May 2003.[8]

29. As regards the Working Group's consideration of possible legal obstacles to electronic commerce that might result from trade-related international instruments, the Commission reiterated its support for the efforts of the Working Group and the Secretariat in that respect. The Commission requested the Working Group to devote most of its time at its fortieth session, in October 2002, to a substantive discussion of various issues that had been raised in the Secretariat's initial survey (A/CN.9/WG.IV/WP.94).[9]

30. At its fortieth session (Vienna, 14-18 October 2002), the Working Group reviewed the survey of possible legal barriers to electronic commerce contained in document A/CN.9/WG.IV/WP.94. The Working Group generally agreed with the

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[8]Ibid., *Fifty-seventh Session, Supplement No. 17* (A/57/17), para. 206.

[9]Ibid., para. 207.

analysis and endorsed the recommendations that had been made by the UNCITRAL secretariat (see A/CN.9/527, paras. 24-71). The Working Group agreed to recommend that the UNCITRAL secretariat take up the suggestions for expanding the scope of the survey so as to review possible obstacles to electronic commerce in additional instruments that had been proposed for inclusion in the survey by other organizations and to explore with those organizations the modalities for carrying out the necessary studies, taking into account the possible constraints put on the secretariat by its current workload. The Working Group invited member States to assist the UNCITRAL secretariat in that task by identifying appropriate experts or sources of information in respect of the various specific fields of expertise covered by the relevant international instruments. The Working Group used the remaining time at that session to resume its deliberations on the preliminary convention (see A/CN.9/527, paras. 72-126).

31. The Working Group resumed its deliberations on the preliminary convention at its forty-first session (New York, 5-9 May 2003). The Working Group noted that a task force that had been established by the International Chamber of Commerce had submitted comments on the scope and purpose of the Convention (A/CN.9/WG.IV/WP.101, annex). The Working Group generally welcomed the work being undertaken by private-sector representatives, such as the International Chamber of Commerce, which was considered to complement usefully the work being undertaken in the Working Group to develop an international convention. The decisions and deliberations of the Working Group with respect to the Convention are reflected in chapter IV of the report on its forty-first session (see A/CN.9/528, paras. 26-151).

32. In accordance with a decision taken at its fortieth session (see A/CN.9/527, para. 93), the Working Group also held a preliminary discussion on the question of excluding intellectual property rights from the Convention (see A/CN.9/528, paras. 55-60). The Working Group agreed that the Secretariat should be requested to seek the specific advice of relevant international organizations, such as the World Intellectual Property Organization (WIPO) and the World Trade Organization, as to whether, in the view of those organizations, including contracts that involved the licensing of intellectual property rights in the scope of the Convention so as to expressly recognize the use of data messages in the context of those contracts might negatively interfere with rules on the protection of intellectual property rights. It was agreed that whether or not such exclusion was necessary would ultimately depend on the substantive scope of the Convention.

33. At its thirty-sixth session (Vienna, 30 June-11 July 2003), the Commission noted the progress made by the UNCITRAL secretariat in connection with a survey of possible legal barriers to the development of electronic commerce in international trade-related instruments. The Commission reiterated its belief in the importance of that project and its support for the efforts of the Working Group and the UNCITRAL secretariat in that respect. The Commission noted that the Working Group had recommended that the UNCITRAL secretariat expand the scope of the survey to review possible obstacles to electronic commerce in additional instruments

that had been proposed to be included in the survey by other organizations and to explore with those organizations the modalities for carrying out the necessary studies, taking into account the possible constraints put on the secretariat by its current workload. The Commission called on member States to assist the UNCITRAL secretariat in that task by inviting appropriate experts or sources of information in respect of the various specific fields of expertise covered by the relevant international instruments.[10]

34. The Commission further noted with appreciation that the Working Group had continued its consideration of a preliminary convention dealing with selected issues related to electronic contracting. The Commission reaffirmed its belief that the instrument under consideration would be a useful contribution to facilitate the use of modern means of communication in cross-border commercial transactions. The Commission observed that the form of an international convention had been used by the Working Group thus far as a working assumption, but that did not preclude the choice of another form for the instrument at a later stage of the Working Group's deliberations.[11]

35. The Commission was informed that the Working Group had exchanged views on the relationship between the preliminary convention and the Working Group's efforts to remove possible legal obstacles to electronic commerce in existing international instruments relating to international trade (see A/CN.9/528, para. 25). The Commission expressed support for the Working Group's efforts to tackle both lines of work simultaneously.[12]

36. The Commission was informed that the Working Group had held a preliminary discussion on the question of whether intellectual property rights should be excluded from the convention (see A/CN.9/528, paras. 55-60). The Commission noted the Working Group's understanding that its work should not be aimed at providing a substantive law framework for transactions involving "virtual goods", nor was it concerned with the question of whether and to what extent "virtual goods" were or should be covered by the United Nations Sales Convention. The question before the Working Group was whether and to what extent the solutions for electronic contracting being considered in the context of the preliminary convention could also apply to transactions involving licensing of intellectual property rights and similar arrangements. The Secretariat was requested to seek the views of other international organizations on the question, in particular WIPO.[13]

37. At its forty-second session (Vienna, 17-21 November 2003), the Working Group began its deliberations by holding a general discussion on the scope of the preliminary convention. The Working Group, inter alia, noted that a task force had been established by the International Chamber of Commerce to develop contractual

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[10]Ibid., *Fifty-eighth Session, Supplement No. 17* (A/58/17), para. 211.

[11]Ibid., para. 212.

[12]Ibid., para. 213.

[13]Ibid., para. 214.

rules and guidance on legal issues related to electronic commerce, tentatively called "e-Terms 2004". The Working Group welcomed the work being undertaken by the International Chamber of Commerce, which was considered to complement usefully the work being undertaken in the Working Group to develop an international convention. The Working Group was of the view that the two lines of work were not mutually exclusive, in particular since the convention dealt with requirements that were typically found in legislation, and legal obstacles, being statutory in nature, could not be overcome by contractual provisions or non-binding standards. The Working Group expressed its appreciation to the International Chamber of Commerce for the interest in carrying out its work in cooperation with UNCITRAL and confirmed its readiness to provide comments on drafts that the International Chamber of Commerce would be preparing (see A/CN.9/546, paras. 33-38).

38. The Working Group proceeded to review articles 8 to 15 of the revised preliminary convention contained in the annex to a note by the Secretariat (A/CN.9/WG.IV/WP.103). The Working Group agreed to make several amendments to those provisions and requested the Secretariat to prepare a revised draft for future consideration (see A/CN.9/546, paras. 39-135).

39. The Working Group continued its work on the preliminary convention at its forty-third session (New York, 15-19 March 2004) on the basis of a note by the Secretariat that contained a revised version of the preliminary convention (A/CN.9/WG.IV/WP.108). The deliberations of the Working Group focused on draft articles X, Y and 1 to 4 (see A/CN.9/548, paras. 13-123). The Working Group agreed that it should endeavour to complete its work on the convention with a view to enabling its review and approval by the Commission in 2005.

40. At its thirty-seventh session (New York, 14-25 June 2004), the Commission took note of the reports of the Working Group on the work of its forty-second and forty-third sessions (A/CN.9/546 and A/CN.9/548, respectively). The Commission was informed that the Working Group had undertaken a review of articles 8 to 15 of the revised text of the preliminary convention at its forty-second session. The Commission noted that the Working Group, at its forty-third session, had reviewed articles X and Y as well as articles 1 to 4 of the convention and that the Working Group had held a general discussion on draft articles 5 to 7 bis. The Commission expressed its support for the efforts by the Working Group to incorporate in the convention provisions aimed at removing possible legal obstacles to electronic commerce that might arise under existing international trade-related instruments. The Commission was informed that the Working Group had agreed that it should endeavour to complete its work on the convention with a view to enabling its review and approval by the Commission in 2005. The Commission expressed its appreciation for the Working Group's endeavours and agreed that a timely completion of the Working Group's deliberations on the convention should be treated as a matter of importance.[14]

[14]Ibid., *Fifty-ninth Session, Supplement No. 17* (A/59/17), para. 71.

41. The Working Group resumed its deliberations at its forty-fourth session (Vienna, 11-22 October 2004), on the basis of a newly revised preliminary convention contained in the annex to a note by the Secretariat (A/CN.9/WG.IV/WP.110). The Working Group reviewed and adopted draft articles 1 to 14, 18 and 19 of the convention. The relevant decisions and deliberations of the Working Group are reflected in its report on the work of its forty-fourth session (A/CN.9/571, paras. 13-206). At that time, the Working Group also held an initial exchange of views on the preamble and the final clauses of the convention, including proposals for additional provisions in chapter IV. In the light of its deliberations on chapters I, II and III and articles 18 and 19 of the convention, the Working Group requested the Secretariat to make consequential changes in the draft final provisions in chapter IV. The Working Group also requested the Secretariat to insert within square brackets in the final draft to be submitted to the Commission the draft provisions that had been proposed for addition to the text considered by the Working Group (A/CN.9/WG.IV/WP.110). The Working Group requested the Secretariat to circulate the revised version of the convention to Governments for their comments, with a view to consideration and adoption of the convention by the Commission at its thirty-eighth session, in 2005.

42. A number of Governments and international organizations submitted written comments on the convention (see A/CN.9/578 and Add. 1-17). UNCITRAL considered the convention and the comments received at its thirty-eighth session (Vienna, 4-15 July 2005). UNCITRAL agreed to make a few substantive amendments to the draft text and submitted it to the General Assembly for adoption. The deliberations of UNCITRAL are reflected in the report on the work of its thirty-eighth session.[15]

43. The General Assembly adopted the Convention on 23 November 2005 and the Secretary-General opened it for signature, from 16 January 2006 to 16 January 2008, by its resolution 60/21, which read as follows:

> *The General Assembly*,
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> *Recalling* its resolution 2205 (XXI) of 17 December 1966, by which it established the United Nations Commission on International Trade Law with a mandate to further the progressive harmonization and unification of the law of international trade and in that respect to bear in mind the interests of all peoples, in particular those of developing countries, in the extensive development of international trade,
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> *Considering* that problems created by uncertainties as to the legal value of electronic communications exchanged in the context of international contracts constitute an obstacle to international trade,
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> *Convinced* that the adoption of uniform rules to remove obstacles to the use of electronic communications in international contracts, including obstacles

[15]Ibid., *Sixtieth Session, Supplement No. 17* (A/60/17), paras. 12-167.

that might result from the operation of existing international trade law instruments, would enhance legal certainty and commercial predictability for international contracts and may help States gain access to modern trade routes,

*Recalling* that, at its thirty-fourth session, in 2001, the Commission decided to prepare an international instrument dealing with issues of electronic contracting, which should also aim at removing obstacles to electronic commerce in existing uniform law conventions and trade agreements, and entrusted its Working Group IV (Electronic Commerce) with the preparation of a draft,[16]

*Noting* that the Working Group devoted six sessions, from 2002 to 2004, to the preparation of the draft Convention on the Use of Electronic Communications in International Contracts, and that the Commission considered the draft Convention at its thirty-eighth session, in 2005, [17]

*Being aware* that all States and interested international organizations were invited to participate in the preparation of the draft Convention at all the sessions of the Working Group and at the thirty-eighth session of the Commission, either as members or as observers, with a full opportunity to speak and make proposals,

*Noting with satisfaction* that the text of the draft Convention was circulated for comments before the thirty-eighth session of the Commission to all Governments and international organizations invited to attend the meetings of the Commission and the Working Group as observers, and that the comments received were before the Commission at its thirty-eighth session,[18]

*Taking note with satisfaction* of the decision of the Commission at its thirty-eighth session to submit the draft Convention to the General Assembly for its consideration,[19]

*Taking note* of the draft Convention approved by the Commission,[20]

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for preparing the draft Convention on the Use of Electronic Communications in International Contracts;[20]

2. *Adopts* the United Nations Convention on the Use of Electronic Communications in International Contracts, which is contained in the annex to the present resolution, and requests the Secretary-General to open it for signature;

3. *Calls upon* all Governments to consider becoming party to the Convention.

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[16]Ibid., *Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), paras. 291-295.

[17]Ibid., *Sixtieth Session, Supplement No. 17* (A/60/17), chap. III.

[18]A/CN.9/578 and Add.1-17.

[19]*Official Records of the General Assembly, Sixtieth Session, Supplement No. 17* (A/60/17), para. 167.

[20]Ibid., annex I.

## IV. Article-by-article remarks

### PREAMBLE

### *1. Essential objectives of the Convention*

44. The preamble is intended to serve as a statement of the general principles on which the Electronic Communications Convention is based and which, under article 5, may be used in filling the gaps left in the Convention.

45. The essential objective of the Convention is reflected in the fourth paragraph of the Preamble, that is, to establish uniform rules intended to remove obstacles to the use of electronic communications in international contracts, including obstacles that might result from the operation of existing international trade law instruments, with a view to enhancing legal certainty and commercial predictability.

### *2. Main principles on which the Convention is based*

46. The fifth paragraph of the Preamble makes reference to two principles that have guided the entire work of UNCITRAL in the area of electronic commerce: technological neutrality and functional equivalence.

#### *Technological neutrality*

47. The principle of technological neutrality means that the Electronic Communications Convention is intended to provide for the coverage of all factual situations where information is generated, stored or transmitted in the form of electronic communications, irrespective of the technology or the medium used. For that purpose, the rules of the Convention are "neutral" rules; that is, they do not depend on or presuppose the use of particular types of technology and could be applied to communication and storage of all types of information.

48. Technological neutrality is particularly important in view of the speed of technological innovation and development, and helps to ensure that the law is able to accommodate future developments and does not quickly become dated. One of the consequences of the approach taken by the Convention, similarly to the UNCITRAL Model Law on Electronic Commerce, which preceded the Convention, is the adoption of new terminology, aimed at avoiding any reference to particular technical means of transmission or storage of information. Indeed, language that directly or indirectly excludes any form or medium by way of a limitation in the scope of the Convention would run counter to the purpose of providing truly technologically neutral rules. Lastly, technological neutrality encompasses also "media neutrality": the focus of the Convention is to facilitate "paperless" means of communication by offering criteria under which they can become equivalents of paper documents, but the Convention is not intended to alter traditional rules on paper-based communications or create separate substantive rules for electronic communications.

49. The concern to promote media neutrality raises other important points. In the world of paper documents it is impossible to guarantee absolute security against

fraud and transmission errors. The same risk exists in principle for electronic communications. Conceivably, the law could attempt to mirror the stringent security measures that are used in communication between computers. However, it may be more appropriate to graduate security requirements in steps similar to the degrees of legal security encountered in the paper world and to respect the gradation, for example, of the different levels of handwritten signature seen in documents of simple contracts and notarized acts. Hence the flexible notion of reliability "appropriate for the purpose for which the electronic communication was generated" as set out in article 9.

### *Functional equivalence*

50. The Convention is based on the recognition that legal requirements prescribing the use of traditional paper-based documentation constitute a significant obstacle to the development of modern means of communication. An electronic communication, in and of itself, cannot be regarded as an equivalent of a paper document because it is of a different nature and does not necessarily perform all conceivable functions of a paper document. Indeed, while paper-based documents are readable by the human eye, electronic communications are not—unless they are printed to paper or displayed on a screen. The Convention deals with possible impediments to the use of electronic commerce posed by domestic or international form requirements by way of an extension of the scope of notions such as "writing", "signature" and "original", with a view to encompassing computer-based techniques.

51. In pursuing that purpose, the Convention relies on the "functional equivalent approach" already used by UNCITRAL in the Model Law on Electronic Commerce. The functional equivalent approach is based on an analysis of the purposes and functions of the traditional paper-based requirement with a view to determining how those purposes or functions could be fulfilled through electronic-commerce techniques. The Convention does not attempt to define a computer-based equivalent to any particular kind of paper document. Instead, it singles out basic functions of paper-based form requirements, with a view to providing criteria which, once they are met by electronic communications, enable such electronic communications to enjoy the same level of legal recognition as corresponding paper documents performing the same function.

52. The Convention is intended to permit States to adapt their domestic legislation to developments in communications technology applicable to trade law without necessitating the wholesale removal of the paper-based requirements themselves or disturbing the legal concepts and approaches underlying those requirements.

*References to preparatory work*

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| Working Group IV, 44th session (Vienna, 11-22 October 2004) | A/CN.9/571, para. 10 |
| Working Group IV, 43rd session (New York, 15-19 March 2004) | A/CN.9/548, para. 82 |

# CHAPTER I. SPHERE OF APPLICATION

## *Article 1. Scope of application*

### *1. Substantive scope of application*

53. The primary purpose of the Electronic Communications Convention is to facilitate international trade by removing possible legal obstacles or uncertainty concerning the use of electronic communications in connection with the formation or performance of contracts concluded between parties located in different countries. However, the Convention does not deal with substantive law issues related to the formation of contracts or with the rights and obligations of the parties to a contract concluded by electronic means. By and large, international contracts are subject to domestic law, except for the very few types of contract to which a uniform law applies, such as sales contracts falling under the United Nations Sales Convention. In preparing the Electronic Communications Convention, UNCITRAL therefore was mindful of the need to avoid creating a duality of regimes for contract formation: a uniform regime for electronic contracts under the new Convention and a different, not harmonized regime, for contract formation by any other means (see A/CN.9/527, para. 76).

54. UNCITRAL nevertheless recognized that a strict separation between technical and substantive issues in the context of electronic commerce was not always feasible or desirable. Since the Convention was intended to offer practical solutions to issues related to the use of electronic means of communication for commercial contracting, a few substantive rules were needed beyond the mere reaffirmation of the principle of functional equivalence (see A/CN.9/527, para. 81). Examples of provisions that highlight the interplay between technical and substantive rules include article 6 (Location of the parties), article 9 (Form requirements), article 10 (Time and place of dispatch and receipt of electronic communications), article 11 (Invitations to make offers) and article 14 (Error in electronic communications). As much as possible, however, these provisions focus only on particular issues raised by the use of electronic communications, leaving aspects of substantive law to other regimes such as the United Nations Sales Convention (see A/CN.9/527, paras. 77 and 102).

#### *"in connection with the formation or performance of a contract"*

55. The Electronic Communications Convention applies to any exchange of electronic communications related to the formation or performance of a contract. The Convention is meant also to apply to communications that are made at a time when no contract—and possibly not even negotiation of a contract—has yet come into being (see A/CN.9/548, para. 84). Article 11, dealing with invitations to make offers, is an example of such a case. However, the Convention is not confined to the context of contract formation, as electronic communications are used for the exercise of a variety of rights arising out of the contract (such as notices of receipt of goods, notices of claims for failure to perform or notices of termination) or even for performance, as in the case of electronic fund transfers (see A/CN.9/509, para. 35).

56. The focus of the Convention is on the relations between the parties to an existing or contemplated contract. Thus, the Convention is not intended to apply to the exchange of communications or notices between the parties to a contract and third parties, merely because those communications have a "connection" to a contract covered by the Convention when the dealings between those parties are not themselves subject to the Convention. For example, if domestic law requires notification to a public authority in respect of a contract to which the Convention applies (for instance, in order to obtain an export licence), the Convention does not apply to the form in which the domestic notification can be made (see A/CN.9/548, para. 83).

57. In the context of the Convention, the word "contract" should be understood broadly so as to cover any form of legally binding agreement between two parties that is not explicitly or implicitly excluded from the Convention, whether or not the word "contract" is used by the law or the parties to refer to the agreement in question. Thus, the Convention applies to arbitration agreements in electronic form, even though the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)[21] and most domestic laws do not use the word "contract" to refer to them.[22]

### *"parties" and "places of business"*

58. As used in the Electronic Communications Convention, the word "parties" includes both natural persons and legal entities. However, a few provisions of the Convention refer specifically to "natural persons" (for instance, art. 14).

59. The Convention applies to international contracts regardless of their nature and qualification under domestic law. However, the reference to "places of business" in article 1 provides a general indication of the trade-related nature of the contracts to which the Convention is intended to apply (see further paras. 70-74 below).

## *2. Geographic scope of application*

60. The Electronic Communications Convention is only concerned with international contracts so as not to interfere with domestic law (see A/CN.9/509, para. 31 and A/CN.9/528, para. 33). For the purposes of the Convention, a contract is international if the parties have their places of business in different States, but the Convention does not require that both States should be contracting States of the Convention, so long as the law of a contracting State applies to the dealings of the parties (see A/CN.9/571, para. 19).

61. The definition of the geographic scope of application of the Convention differs, therefore, from the general rule in article 1 *(a)* of the United Nations Sales

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[21]United Nations, *Treaty Series*, vol. 330, No. 4739.

[22]*Official Records of the General Assembly, Sixtieth Session, Supplement No. 17* (A/60/17), para. 23.

Convention, which—for those States that have excluded the application of the United Nations Sales Convention by virtue of the rules of private international law—makes that Convention applicable only if both parties are located in contracting States. However, the definition of the Electronic Communications Convention's geographic field of application is not entirely new and has been used, for example, in article 1 of the Uniform Law on the International Sale of Goods, adopted as an annex to the Convention relating to a Uniform Law on the International Sale of Goods (The Hague, 1964).[23]

62. In the context of the United Nations Sales Convention, the need for both countries involved to be contracting States was introduced to allow the parties to determine easily whether or not that Convention applied to their contract, without having to resort to rules of private international law to identify the applicable law. The possibly narrower geographic field of application offered by that option was compensated for by the advantage of the enhanced legal certainty it provided. UNCITRAL had initially contemplated for the new Electronic Communications Convention a rule similar to paragraph 1 *(a)* of article 1 of the United Nations Sales Convention to ensure consistency between the two texts (see A/CN.9/509, para. 38). However, as the deliberations progressed and the impact of the Electronic Communications Convention became clearer, the need for parallelism between that Convention and the United Nations Sales Convention was questioned since it was felt that their respective scopes of application were in any event independent of each other (see A/CN.9/548, para. 89).

63. Two main reasons eventually led UNCITRAL to do away with the requirement of double participation in the Electronic Communications Convention. First, it was felt that the application of the Convention would be simplified and its practical reach greatly enhanced if it were simply to apply to international contracts, that is, contracts between parties in two different States, without the cumulative requirement that both those States should also be contracting States of the Convention (see A/CN.9/548, para. 87). Secondly, UNCITRAL considered that, to the extent that several provisions of the Convention were intended to support or facilitate the operation of other laws in an electronic environment (such as, for example, arts. 8 and 9), requiring that both parties be located in contracting States would lead to the undesirable result that a court in a contracting State might be mandated to interpret the provisions of its own laws (for instance, in respect of form requirements) in different ways, depending on whether or not both parties to an international contract were located in contracting States of the Convention (see A/CN.9/548, para. 87; see also A/CN.9/571, para. 17).

64. Contracting States may however reduce the reach of the Convention by declarations made under article 19, for example by declaring that they will apply the Convention only to electronic communications exchanged between parties located in contracting States.

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[23]United Nations, *Treaty Series*, vol. 834, No. 11929.

### *3. Relationship to private international law*

65. It was understood by UNCITRAL that the Electronic Communications Convention applied when the law of a contracting State was the law applicable to the dealings between the parties. Whether the law of a contracting State applies to a transaction is a question to be determined by the rules of private international law of the forum State, if the parties have not validly chosen the applicable law.[24] Accordingly, if a party seizes the court of a non-contracting State, the court would refer to the private international law rules of the State in which it is located, and if those rules designate the law of a contracting State to the Convention, the Convention would apply as part of the substantive law of that State, notwithstanding that the State of the court seized is not a party to the Convention. If a party seizes the court of a contracting State, the court would equally refer to its own rules of private international law and, if they designate the substantive law of that State or of any other State party to the Convention, the Convention would apply. In either case, the court should take into account any possible declarations made pursuant to article 19 or 20 by the contracting State whose law applies.

66. The Convention contains rules of private law applicable to contractual relations. Nothing in the Convention creates any obligation for States that do not ratify or accede to the Convention. The courts in a non-contracting State will apply the provisions of the Convention only when their own rules of private international law indicate that the law of a contracting State is applicable, in which case the Convention would apply as part of that foreign State's legal system. The application of foreign law is a common result of any system of private international law and has been traditionally accepted by most countries. The Convention has not introduced any new element to this situation.[25]

### *4. International nature disregarded when not apparent*

67. Paragraph 2 of article 1 of the Electronic Communications Convention contains a rule similar to article 1, paragraph 2, of the United Nations Sales Convention. According to this provision, the Electronic Communications Convention does not apply to an international contract when it is not apparent either from the contract or from the dealings between the parties that they are located in two different States. In those cases, the Convention gives way to the application of domestic law. The incorporation of this rule in the Convention is intended to protect the legitimate expectations of parties that assume to operate under their domestic regime given the absence of a clear indication to the contrary (see A/CN.9/528, para. 45).

### *5. "Civil" or "commercial" character, as well as nationality of the parties, are irrelevant*

68. As is the case for the United Nations Sales Convention, the application of the Electronic Communications Convention does not depend on whether the parties are

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[24]See *Official Records of the General Assembly, Sixtieth Session, Supplement No. 17* (A/60/17), para. 20.

[25]Ibid., para. 19.

considered "civil" or "commercial". Therefore, for the purpose of determining the scope of the Electronic Communications Convention, it does not matter whether a party is a merchant or not in a particular legal system that applies special rules to commercial contracts different from the general rules of contract law. The Convention avoids conflicts that arise between the so-called "dualistic" systems, which distinguish between the civil and commercial character of the parties or the transaction, and "monistic" legal systems, which do not make that distinction.

69. The nationality of the parties is also irrelevant. Thus, the Convention applies to nationals of non-contracting States who have their places of business within a contracting State and even a non-contracting State, as long as the law applicable to the contract is the law of a contracting State. Under certain circumstances, a contract between two nationals of the same State may also be governed by the Convention, for instance because one of the parties has its place of business or habitual residence in a different country and this fact was known to the other party.

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| Working Group IV, 41st session (New York, 5-9 May 2003) | A/CN.9/528, paras. 32-48 |
| Working Group IV, 40th session (Vienna, 14-18 October 2002) | A/CN.9/527, paras. 73-81 |
| Working Group IV, 39th session (New York, 11-15 March 2002) | A/CN.9/509, paras. 28-40 |

## *Article 2. Exclusions*

### *1. Contracts for personal, family or household purposes*

70. As is the case for other instruments previously prepared by UNCITRAL, the Electronic Communications Convention does not apply to contracts concluded for "personal, family or household purposes".

#### *Rationale of exclusion*

71. There was general agreement within UNCITRAL on the importance of excluding contracts negotiated for personal, family or household purposes since a number of rules in the Convention would not be appropriate in their context.

72. For example, a rule such as that contained in article 10, paragraph 2, which presumes receipt of an electronic communication from the moment that the

electronic communication becomes capable of being retrieved by the addressee, might not be appropriate in the context of transactions involving consumers, because consumers could not be expected to check their electronic mail regularly nor be able to distinguish easily between legitimate commercial messages and unsolicited mail ("spam"). It was considered that individuals acting for personal, family or household purposes should not be held to the same standards of diligence as entities or persons engaged in commercial activities (see A/CN.9/548, para. 101).

73. Another example of possible tension is the treatment of errors and the consequences of errors in the Convention, which is far from the level of detail that would typically be found in consumer protection rules. Also, consumer protection rules typically require vendors to make the contract terms available to consumers in an accessible manner. They often set forth conditions for the enforcement of standard contractual terms and conditions against consumers and specify the conditions under which a consumer could be presumed to have expressed his or her consent to terms and conditions incorporated by reference into the contract. None of those issues are dealt with in the Convention in a manner that would offer the degree of protection that consumers enjoy in several legal systems (see A/CN.9/548, para. 102).

### *Exclusion not limited to consumer contracts*

74. In the context of the United Nations Sales Convention, the phrase "personal, family or household purposes" is commonly understood as referring to consumer contracts. However, in the context of the Electronic Communications Convention, which is not limited to electronic communications related to purchase transactions, the words in subparagraph 1 *(a)* of article 2 have a broader meaning and would cover, for example, communications related to contracts governed by family law and the law of succession, such as matrimonial property contracts, to the extent that they are entered into for "personal, family or household purposes".[26]

### *Absolute nature of exclusion*

75. Unlike the corresponding exclusion under article 2, subparagraph *(a)*, of the United Nations Sales Convention, the exclusion of contracts entered for personal, family or household purposes under the Electronic Communications Convention is an absolute one, meaning that the Convention does not apply to contracts entered into for personal, family or household purposes, even if the purpose of the contract is not apparent to the other party.

76. According to its article 2, subparagraph *(a)*, the United Nations Sales Convention does not apply to sales of goods bought for personal, family or household use "unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use". That qualification was intended to promote legal certainty. Without it, the applicability of the United Nations Sales Convention would depend entirely on the

[26]Ibid., para. 29.

seller's ability to ascertain the purpose for which the buyer had bought the goods. As a result, the personal, family or household purpose of a sales contract cannot be held against the seller, for the purpose of excluding the applicability of the United Nations Sales Convention, if the seller did not know or could not have been expected to know (for instance, having regard to the number or nature of items bought) that the goods were being bought for such purpose. The drafters of the United Nations Sales Convention assumed that there might be situations where a sales contract would fall under that Convention, despite the fact of it having being entered into by a consumer, for example. The legal certainty gained with the provision appeared to have outweighed the risk of covering transactions intended to have been excluded. It was observed, moreover, that, as indicated in the commentary on the draft Convention on Contracts for the International Sale of Goods, which had been prepared at the time by the Secretariat,[27] article 2, subparagraph *(a)*, of the United Nations Sales Convention was based on the assumption that consumer sales were international transactions only in "relatively few cases" (see A/CN.9/527, para. 86).

77. In the case of the Electronic Communications Convention, however, UNCITRAL felt that the formulation of article 2, subparagraph *(a)*, of the United Nations Sales Convention might be problematic, as the ease of access afforded by open communication systems not available at the time of the preparation of the United Nations Sales Convention, such as the Internet, greatly increased the likelihood of consumers purchasing goods from a seller established in another country (see A/CN.9/527, para. 87). Having recognized that certain rules of the Electronic Communications Convention might not be appropriate in the context of consumer transactions, UNCITRAL agreed that consumers should be completely excluded from the reach of the Convention (see A/CN.9/548, paras. 101 and 102).

## *2. Specific financial transactions*

78. Paragraph 1 *(b)* of article 2 lists a number of transactions excluded from the scope of application of the Electronic Communications Convention. They relate essentially to certain financial service markets governed by well-defined regulatory and contractual rules that already address issues relating to electronic commerce in a manner that allows for their effective worldwide functioning. Given the inherently cross-border nature of those markets, UNCITRAL considered that this exclusion should not be left for country-based declarations under article 19 (see A/CN.9/527, para. 95; A/CN.9/528, para. 61; A/CN.9/548, para. 109; and A/CN.9/571, para. 62).

79. It should be noted that this provision does not contemplate a broad exclusion of financial services per se, but rather specific transactions such as payment systems, negotiable instruments, derivatives, swaps, repurchase agreements (repos),

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[27] *Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980: Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committees* (United Nations publication, Sales No. E.81.IV.3), part one, sect. D, art. 2, commentary.

foreign exchange, securities and bond markets. The criterion for the exclusion in paragraph 1 *(b)* of article 2 is not the type of the asset being traded but the method of settlement used. In addition, not every regulated trading activity is excluded but trading under the auspices of a regulated exchange is (e.g. stock exchange, securities and commodities exchange, foreign currency exchange and precious metal exchange). As a result, the use of electronic communications in connection with trading of securities, commodities, foreign currency or precious metals outside a regulated exchange is not necessarily excluded merely because it is in connection with the trading of securities (e.g. an e-mail sent by an investor to his or her broker, instructing the latter to buy or sell securities).

### *3. Negotiable instruments, documents of title and similar documents*

80. Paragraph 2 of article 2 excludes negotiable instruments and similar documents because the potential consequences of unauthorized duplication of documents of title and negotiable instruments—and generally any transferable instrument that entitles the bearer or beneficiary to claim the delivery of goods or the payment of a sum of money—make it necessary to develop mechanisms to ensure the singularity of those instruments.

81. The issues raised by negotiable instruments and similar documents, in particular the need for ensuring their uniqueness, go beyond simply ensuring the equivalence between paper and electronic forms, which is the main aim of the Electronic Communications Convention and justifies the exclusion provided in paragraph 2 of the article. UNCITRAL was of the view that finding a solution for this problem required a combination of legal, technological and business solutions, which had not yet been fully developed and tested (see A/CN.9/571, para. 136).[28]

### *4. Individual exclusions*

82. During the preparation of the Electronic Communications Convention, there were suggestions to include a number of other transactions to the list of excluded matters in article 2, such as contracts that created or transferred rights in real estate (except for rental rights), contracts requiring by law the involvement of courts, public authorities or professions exercising public authority, contracts of suretyship granted by and on collateral securities furnished by persons acting for purposes outside their trade, business or profession and contracts governed by family law or by the law of succession (see A/CN.9/548, para. 110).

83. The preponderant view within UNCITRAL was not in favour of the proposed exclusions. Some matters would automatically be excluded under article 1, paragraph 1, or article 2, paragraph 1 *(a)*. Other matters were regarded as territory-specific issues that should be better dealt with at the domestic level. UNCITRAL

[28]Ibid., para. 27.

took note of the fact that some States already admitted the use of electronic communications in connection with some, if not all, of the matters contemplated in the proposed exclusions. It was felt that the adoption of an extensive list of exemptions would have the effect of imposing those exclusions even for States that saw no reason for preventing the parties to those transactions from using electronic communications (see A/CN.9/571, para. 63), a result which would hinder the adaptation of the law to technological evolution (see A/CN.9/571, para. 65). However, States that feel that electronic communications should not be authorized in particular cases still have the option of making individual exclusions by declarations under article 19.

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| Working Group IV, 44th session (Vienna, 11-22 October 2004) | A/CN.9/571, paras. 59-69; see also para. 136 |
| Working Group IV, 43rd session (New York, 15-19 March 2004) | A/CN.9/548, paras. 98-111; see also paras. 112-118 (on a related draft article since deleted) |
| Working Group IV, 41st session (New York, 5-9 May 2003) | A/CN.9/528, paras. 49-64, see also paras. 65-69 (on a related draft article since deleted) |
| Working Group IV, 40th session (Vienna, 14-18 October 2002) | A/CN.9/527, paras. 82-98; see also paras. 99-104 (on a related draft article since deleted) |

## *Article 3. Party autonomy*

### *1. Extent of power to derogate*

84. In preparing the Electronic Communications Convention, UNCITRAL was mindful of the fact that, in practice, solutions to the legal difficulties raised by the use of modern means of communication were mostly sought within contracts. The Convention reflects the view of UNCITRAL that party autonomy is vital in contractual negotiations and should be broadly recognized by the Convention.[29]

85. At the same time, it was generally accepted that party autonomy did not extend to setting aside statutory requirements that imposed, for instance, the use of specific methods of authentication in a particular context. This is particularly important

[29]Ibid., para. 33.

in connection with article 9 of the Convention, which provides criteria under which electronic communications and their elements (e.g. signatures) may satisfy form requirements, which are normally of a mandatory nature since they reflect decisions of public policy. Party autonomy does not allow the parties to relax statutory requirements (for example, on signature) in favour of methods of authentication that provide a lesser degree of reliability than electronic signatures, which is the minimum standard recognized by the Convention (see A/CN.9/527, para. 108; see also A/CN.9/571, para. 76).

86. Nevertheless, as provided in article 8, paragraph 2, the Convention does not require the parties to accept electronic communications if they do not want to. This also means, for instance, that the parties may choose not to accept electronic signatures (see A/CN.9/527, para. 108).

87. Under the Convention, party autonomy applies only to provisions that create rights and obligations for the parties, and not to the provisions of the Convention that are directed to contracting States (see A/CN.9/571, para. 75).

## *2. Form of derogation*

88. Article 3 is intended to apply not only in the context of relationships between originators and addressees of data messages but also in the context of relationships involving intermediaries. Thus, the provisions of the Electronic Communications Convention can be varied either by bilateral or multilateral agreements between the parties, or by system rules agreed to by them.

89. It was the understanding of UNCITRAL that derogations from the Convention did not need to be explicitly made but could also be made implicitly, for example by parties agreeing to contract terms at variance with the provisions of the Convention (see A/CN.9/548, para. 123).[30]

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| UNCITRAL, 38th session (Vienna, 4-15 July 2005) | A/60/17, paras. 31-34 |
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| Working Group IV, 43rd session (New York, 15-19 March 2004) | A/CN.9/548, paras. 119-124 |
| Working Group IV, 41st session (New York, 5-9 May 2003) | A/CN.9/528, paras. 70-75 |
| Working Group IV, 40th session (Vienna, 14-18 October 2002) | A/CN.9/527, paras. 105-110 |

[30]Ibid., para. 32.

## CHAPTER II. GENERAL PROVISIONS

### *Article 4. Definitions*

90. Most of the definitions contained in article 4 are based on definitions used in the UNCITRAL Model Law on Electronic Commerce.

#### *"Communication"*

91. The definition of "communication" is intended to make clear that the Electronic Communications Convention applies to a wide range of exchanges of information between parties to a contract, whether at the stage of negotiations, during performance or after a contract has been performed.

#### *"Electronic communication" and "data message"*

92. The definition of "electronic communication" establishes a link between the purposes for which electronic communications may be used and the notion of "data messages", which already appeared in the UNCITRAL Model Law on Electronic Commerce and has been retained in view of the wide range of techniques it encompasses, beyond purely "electronic" techniques (see A/CN.9/571, para. 80).

93. The aim of the definition of "data message" is to encompass all types of messages that are generated, stored, or communicated in essentially paperless form. For that purpose, all means of communication and storage of information that might be used to perform functions parallel to the functions performed by the means listed in the definition are intended to be covered by the reference to "similar means", although, for example, "electronic" and "optical" means of communication might not be, strictly speaking, similar. For the purposes of the Convention, the word "similar" connotes "functionally equivalent". The reference to "similar means" indicates that the Convention is not intended only for application in the context of existing communication techniques but also to accommodate foreseeable technical developments.

94. The examples mentioned in the definition of "data message" highlight that this definition covers not only electronic mail but also other techniques that may still be used in the chain of electronic communications, even if some of them (such as telex or telecopy) may not appear to be novel (see A/CN.9/571, para. 81). The reference to "Electronic Data Interchange (EDI)" has been retained in the definition of "data messages" for illustrative purposes only, in view of the widespread use of EDI messages in electronic communications of messages from computer to computer. According to the definition of EDI adopted by the Working Party on Facilitation of International Trade Procedures of the Economic Commission for Europe, which is the United Nations body responsible for the development of technical standards related to United Nations rules for Electronic Data Interchange for Administration, Commerce and Transport (UN/EDIFACT), EDI means the electronic

transfer from computer to computer of information using an agreed standard to structure the information.

95. The definition of "data message" focuses on the information itself, rather than on the form of its transmission. Thus, for the purposes of the Electronic Communications Convention it is irrelevant whether data messages are communicated electronically from computer to computer, or whether data messages are communicated by means that do not involve telecommunications systems, for example, magnetic disks containing data messages delivered to the addressee by courier.

96. The notion of "data message" is not limited to communication but is also intended to encompass computer-generated records that are not meant for communication. Thus, the notion of "message" includes the notion of "record". Lastly, the definition of "data message" is also intended to cover the case of revocation or amendment. A data message is presumed to have a fixed information content but it may be revoked or amended by another data message.

### *"Originator" and "addressee"*

97. The definition of "originator" should cover not only the situation where information is generated and communicated, but also the situation where such information is generated and stored without being communicated. However, the definition of "originator" is intended to eliminate the possibility that a recipient who merely stores a data message might be regarded as an originator.

98. The "addressee" under the Electronic Communications Convention is the person with whom the originator intends to communicate by transmitting the electronic communication, as opposed to any person who might receive, forward or copy it in the course of transmission. The "originator" is the person who generated the electronic communication even if that communication was transmitted by another person. The definition of "addressee" contrasts with the definition of "originator", which is not focused on intent. It should be noted that, under the definitions of "originator" and "addressee" in the Convention, the originator and the addressee of a given electronic communication could be the same person, for example in the case where the electronic communication was intended for storage by its author. However, the addressee who stores an electronic communication transmitted by someone else is not intended to be covered by the definition of "originator".

99. The focus of the Convention is on the relationship between the originator and the addressee, and not on the relationship between either the originator or the addressee and any intermediary. The fact that the Convention does not refer expressly to intermediaries (such as servers or web hosts) does not mean that the Convention ignores their role in receiving, transmitting or storing data messages on behalf of other persons or performing other "value-added services", such as when network operators and other intermediaries format, translate, record, authenticate, certify or preserve electronic communications or provide security services for electronic transactions. However, as the convention was not conceived as a

regulatory instrument for electronic business, it does not deal with the rights and obligations of intermediaries.

100. As used in the Convention, the notion of "party" designates the subjects of rights and obligations and should be interpreted as covering both natural persons and corporate bodies or other legal entities. Where only "natural persons" are meant, the Convention expressly uses those words.

### *"Information system"*

101. The definition of "information system" is intended to cover the entire range of technical means used for transmitting, receiving and storing information. For example, depending on the factual situation, the notion of "information system" could refer to a communications network, and in other instances could include an electronic mailbox or even a telecopier.

102. For the purposes of the Electronic Communications Convention it is irrelevant whether the information system is located on the premises of the addressee or on other premises, since location of information systems is not an operative criterion under the Convention.

### *"Automated message systems"*

103. The notion of "automated message system" refers essentially to a system for automatic negotiation and conclusion of contracts without involvement of a person, at least on one of the ends of the negotiation chain. It differs from an "information system" in that its primary use is to facilitate exchanges leading to contract formation. An automated message system may be part of an information system, but that need not necessarily be the case (see A/CN.9/527, para. 113).

104. The critical element in this definition is the lack of a human actor on one or both sides of a transaction. For example, if a party orders goods through a website, the transaction would be an automated transaction because the vendor took and confirmed the order via its machine. Similarly, if a factory and its supplier do business through EDI, the factory's computer, upon receiving information within certain pre-programmed parameters, will send an electronic order to the supplier's computer. If the supplier's computer confirms the order and processes the shipment because the order falls within pre-programmed parameters in the supplier's computer, this would be a fully automated transaction. If, instead, the supplier relies on a human employee to review, accept, and process the factory's order, then only the factory's side of the transaction would be automated. In either case, the entire transaction falls within the definition.

### *"Place of business"*

105. The definition of "place of business" reflects the essential elements of the notions of "place of business", as understood in international commercial practice,

and "establishment", as used in article 2, subparagraph *(f)*, of the UNCITRAL Model Law on Cross-Border Insolvency[31] (see A/CN.9/527, para. 120). This definition has been included to support the operation of articles 1 and 6 of the Electronic Communications Convention and is not intended to affect other substantive law relating to places of business.[32]

106. The notion of "non-transitory" qualifies the word "establishment", whereas the words "other than the temporary provision of goods or services" qualify the nature of the "economic activity" (see A/CN.9/571, para. 87).

*References to preparatory work*

| | |
|---|---|
| UNCITRAL, 38th session (Vienna, 4-15 July 2005) | A/60/17, paras. 35-37 |
| Working Group IV, 44th session (Vienna, 11-22 October 2004) | A/CN.9/571, paras. 78-89 |
| Working Group IV, 41st session (New York, 5-9 May 2003) | A/CN.9/528, paras. 76-77 |
| Working Group IV, 40th session (Vienna, 14-18 October 2002) | A/CN.9/527, paras. 111-122 |

## *Article 5. Interpretation*

107. The principles reflected in article 5 of the Electronic Communications Convention have appeared in most of the UNCITRAL texts, and its formulation mirrors article 7 of the United Nations Sales Convention. The provision is aimed at facilitating uniform interpretation of the provisions in uniform instruments on commercial law. It follows a practice in private law treaties to provide self-contained rules of interpretation, without which the reader would be referred to general rules of public international law on the interpretation of treaties that might not be entirely suitable for the interpretation of private law provisions (see A/CN.9/527, para. 124).

*References to preparatory work*

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|---|---|
| UNCITRAL, 38th session (Vienna, 4-15 July 2005) | A/60/17, paras. 38 and 39 |
| Working Group IV, 44th session (Vienna, 11-22 October 2004) | A/CN.9/571, paras. 90 and 91 |
| Working Group IV, 41st session (New York, 5-9 May 2003) | A/CN.9/528, paras. 78-80 |
| Working Group IV, 40th session (Vienna, 14-18 October 2002) | A/CN.9/527, paras. 123-126 |

[31]United Nations publication, Sales No. E.99.V.3.

[32]See *Official Records of the General Assembly, Sixtieth Session, Supplement No. 17* (A/60/17), para. 37.

## *Article 6. Location of the parties*

### *1. Purpose of the article*

108. The purpose of article 6 is to offer elements that allow the parties to ascertain the location of the places of business of their counterparts, thus facilitating a determination, among other elements, as to the international or domestic character of a transaction and the place of contract formation. As such, this article is one of the central provisions in the Electronic Communications Convention.

109. Considerable legal uncertainty is caused at present by the difficulty of determining where a party to an online transaction is located. While that danger has always existed, the global reach of electronic commerce has made it more difficult than ever to determine location. This uncertainty could have significant legal consequences, since the location of the parties is important for issues such as jurisdiction, applicable law and enforcement. Accordingly, there was wide agreement within UNCITRAL as to the need for provisions that would facilitate a determination by the parties of the places of business of the persons or entities they had commercial dealings with (see A/CN.9/509, para. 44).

### *2. Nature of presumption of location*

110. At the early stages of its deliberations, UNCITRAL had considered the possibility of including a positive duty for the parties to disclose their places of business or provide other information. However, it was eventually agreed that inclusion of such an obligation would be inappropriate in a commercial law instrument, in view of the difficulty of setting out the consequences of failing to comply with such an obligation.[33]

111. Accordingly, article 6 merely creates a presumption in favour of a party's indication of its place of business, which is accompanied by conditions under which that indication can be rebutted, and by default provisions that apply if no indication has been made. The article is not intended to allow parties to invent fictional places of business that do not meet the requirements of article 4, subparagraph *(h)*.[34] This presumption, therefore, is not absolute and the Convention does not uphold an indication of a place of business by a party even where such an indication is inaccurate or intentionally false (see A/CN.9/509, para. 47).

112. The rebuttable presumption of location established by paragraph 1 of article 6 serves important practical purposes and is not meant to depart from the notion of "place of business", as used in non-electronic transactions. For example, an Internet vendor maintaining several warehouses at different locations from which different goods might be shipped to fulfil a single purchase order effected by electronic means might see a need to indicate one of such locations as its place of

[33]Ibid., para. 43.

[34]Ibid., para. 41.

business for a given contract. Article 6 recognizes that possibility, with the consequence that such an indication could only be challenged if the vendor does not have a place of business at the location it indicated. Without that possibility, the parties might need to enquire, in respect of each contract, which of the vendor's multiple places of business has the closest connection to the relevant contract in order to determine what is the vendor's place of business in that particular case (see A/CN.9/571, para. 98). If a party has only one place of business and has not made any indication, it would be deemed to be located at the place that meets the definition of "place of business" under article 4, subparagraph *(h).*

### *3. Plurality of places of business*

113. Paragraph 2 of article 6 is based on article 10, subparagraph *(a),* of the United Nations Sales Convention. However, unlike that provision, which refers to a place of business that has "the closest relationship to the contract and its performance", article 6, paragraph 2, of the Electronic Communications Convention refers only to the closest relationship to the contract. In the context of the United Nations Sales Convention the cumulative reference to the contract and its performance had given rise to uncertainty, since there might be situations where a given place of business of one of the parties is more closely connected to the contract, but another of that party's places of business is more closely connected to the performance of the contract. These situations are not rare in connection with contracts entered into by large multinational companies and may become even more frequent as a result of the current trend towards increased decentralization of business activities (see A/CN.9/509, para. 51; see also A/CN.9/571, para. 101). It was felt that this minor departure from similar wording in the United Nations Sales Convention would not generate an undesirable duality of regimes in view of the limited scope of the Electronic Communications Convention (see A/CN.9/571, para. 101).

114. The application of paragraph 2 of article 6 would be triggered by the absence of a valid indication of a place of business. The default rule provided here applies not only when a party fails to indicate its place of business, but also when such indication has been rebutted under paragraph 1 of the article.[35]

### *4. Place of business of natural persons*

115. This paragraph does not apply to legal entities, since it is generally understood that only natural persons are capable of having a "habitual residence".

### *5. Limited value of communications technology and equipment for establishing place of business*

116. UNCITRAL carefully avoided devising rules that would result in any given party being considered as having its place of business in one country when contracting electronically and in another country when contracting by more traditional means (see A/CN.9/484, para. 103).

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[35]Ibid., para. 46.

117. Therefore, the Electronic Communications Convention takes a cautious approach to peripheral information related to electronic messages, such as Internet Protocol addresses, domain names or the geographic location of information systems, which despite their apparent objectivity have little, if any, conclusive value for determining the physical location of the parties. Paragraph 4 of article 6 reflects that understanding by providing that the location of equipment and technology supporting an information system or the places from where the information system may be accessed by other parties do not by themselves constitute a place of business. However, nothing in the Electronic Communications Convention prevents a court or arbitrator from taking into account the assignment of a domain name as a possible element, among others, to determine a party's location, where appropriate (see A/CN.9/571, para. 113).

118. UNCITRAL acknowledged that there might be legal entities, such as so-called "virtual companies", whose establishment might not meet all requirements of the definition of "place of business" in article 4, subparagraph *(h)* of the Convention. It was also noted that some business sectors increasingly regarded their technology and equipment as significant assets. However, it was felt that it would be difficult to attempt to formulate universally acceptable criteria for a default rule on location to cover those situations, in view of the variety of options available (e.g. place of incorporation and place of principal management, among others), location of equipment technology being only one—and not necessarily the most significant—of these factors. In any event, if an entity does not have a place of business, the Convention would not apply to its communications under article 1, which depends on transactions applying between parties having their places of business in different States (see A/CN.9/571, para. 103).

119. Paragraph 5 of article 6 reflects the fact that the current system for assignment of domain names was not originally conceived in geographical terms. Therefore, the apparent connection between a domain name and a country is often insufficient to conclude that there is a genuine and permanent link between the domain name user and the country. Also, differences in national standards and procedures for the assignment of domain names make them unfit for establishing a presumption, while the insufficient transparency of the procedures for assigning domain names in some jurisdictions makes it difficult to ascertain the level of reliability of each national procedure (see A/CN.9/571, para. 112).

120. UNCITRAL nevertheless recognized that, in some countries, the assignment of domain names was only made after verification of the accuracy of the information provided by the applicant, including its location in the country to which the relevant domain name related. For those countries, it might be appropriate to rely, at least in part, on domain names for the purpose of article 6 (see A/CN.9/509, para. 58; see also A/CN.9/571, para. 111). Therefore, paragraph 5 only prevents a court or arbitrator from inferring the location of a party from the sole fact that the party uses a given domain name or address. Nothing in this paragraph prevents a court or arbitrator from taking into account the assignment of a domain name as a possible element, among others, to determine a party's location, where appropriate (see A/CN.9/571, para. 113).

121. The formulation of paragraph 5 of article 6 is not open-ended, as the provision is concerned with certain existing technologies in respect of which UNCITRAL was of the view that they did not offer, in and of themselves, a sufficiently reliable connection to a country so as to authorize a presumption of a party's location. It would have been unwise for UNCITRAL to rule out the possibility that new as yet undiscovered technologies may appropriately create a strong presumption as to a party's location in a country to which the technology used would be connected.[36]

*References to preparatory work*

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|---|---|
| UNCITRAL, 38th session (Vienna, 4-15 July 2005) | A/60/17, paras. 40-47 |
| Working Group IV, 44th session (Vienna, 11-22 October 2004) | A/CN.9/571, paras. 92-114 |
| Working Group IV, 41st session (New York, 5-9 May 2003) | A/CN.9/528, paras. 81-93 |
| Working Group IV, 39th session (New York, 11-15 March 2002) | A/CN.9/509, paras. 41-59 |

## *Article 7. Information requirements*

### *1. Information requirements in electronic commerce*

122. Article 7 of the Electronic Communications Convention reminds the parties of the need to comply with possible disclosure obligations that might exist under domestic law. UNCITRAL considered at length various proposals that contemplated a duty for the parties to disclose their places of business, among other information (see A/CN.9/484, para. 103; see also A/CN.9/509, paras. 60-65). UNCITRAL was sensitive to possible gains in legal certainty, transparency and confidence in electronic commerce that might result from promoting good business standards, such as basic disclosure requirements (see A/CN.9/546, para. 91).

123. However, the consensus that eventually emerged was that it would be preferable to address the matter from a different angle, namely by a provision that recognized the possible existence of disclosure requirements under the substantive law governing the contract and reminded the parties of their obligations to comply with such requirements.[37]

124. UNCITRAL recognized that trading partners acting in good faith would normally be expected to provide accurate and truthful information concerning the location of their places of business. The legal consequences of false or inaccurate representations made by them were not primarily a matter of contract formation, but rather a matter of criminal or tort law. To the extent that those questions are dealt with in most legal systems, they would be governed by the applicable law outside the Electronic Communications Convention (see A/CN.9/509, para. 48).

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[36]Ibid., para. 47.

[37]Ibid., para. 49.

125. It was also felt that obligations to disclose certain information would be more appropriately placed in international industry standards or guidelines, rather than in an international convention dealing with electronic contracting. Another possible source of rules of that nature might be domestic regulatory regimes governing the provision of online services, especially under consumer protection regulations. The inclusion of disclosure requirements in the Convention was regarded as particularly problematic since the Convention could not provide for the consequences that might flow from failure by a party to comply with them. On the one hand, rendering commercial contracts invalid or unenforceable for failure to comply with the Convention was said to be an undesirable and unreasonably intrusive solution. On the other hand, providing for other types of sanctions, such as tort liability or administrative sanctions, would have been clearly outside the scope of the Convention (see A/CN.9/509, para. 63; see also A/CN.9/546, paras. 92 and 93).

126. Another reason for deferring to domestic law on the matter was that no similar obligations existed for business transactions in a non-electronic environment so that the interest of promoting electronic commerce would not be served by subjecting it to such special obligations. Under most circumstances, the parties would have a business interest in disclosing their names and places of business, without needing to be required to do so by law. However, in particular situations, such as in certain financial markets or in business models such as Internet auction platforms, it is common for both sellers and buyers to identify themselves only through pseudonyms or codes throughout the negotiating or bidding phase. There are also systems involving trading intermediaries where the identity of the ultimate supplier is not disclosed to potential buyers. The parties in those cases may have various legitimate reasons for not disclosing their identities, including their negotiating strategy (see A/CN.9/546, para. 93).

## *2. Nature of legal information requirements*

127. The phrase “any rule of law” in article 7 has the same meaning as the words “the law” in article 9. They encompass statutory, regulatory and judicially created laws as well as procedural laws but do not cover laws that have not become part of the law of the State, such as *lex mercatoria*, even though the expression “rules of law” is sometimes used in that broader meaning.

128. Given the nature of article 7, which defers to domestic law on disclosure requirements, these requirements remain applicable even if the parties attempt to escape them by excluding the application of the article (see A/CN.9/546, para. 104).

*References to preparatory work*

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| UNCITRAL, 38th session (Vienna, 4-15 July 2005) | A/60/17, paras. 48-50 |
| Working Group IV, 44th session (Vienna, 11-22 October 2004) | A/CN.9/571, paras. 115 and 116 |
| Working Group IV, 42nd session (Vienna, 17-21 November 2003) | A/CN.9/546, paras. 87-105 (at that time, art. 11) |
| Working Group IV, 39th session (New York, 11-15 March 2002) | A/CN.9/509, paras. 60-65 |

# CHAPTER III. USE OF ELECTRONIC COMMUNICATIONS IN INTERNATIONAL CONTRACTS

## *Article 8. Legal recognition of electronic communications*

### *1. Non-discrimination of electronic communications*

129. Paragraph 1 of article 8 of the Electronic Communications Convention restates the general principle of non-discrimination that is contained in article 5 of the UNCITRAL Model Law on Electronic Commerce. This provision means that there should be no disparity of treatment between electronic communications and paper documents, but is not intended to override any of the requirements contained in article 9 of the Convention. By stating that information "shall not be denied validity or enforceability on the sole ground that it is in the form of an electronic communication", article 8, paragraph 1, merely indicates that the form in which certain information is presented or retained cannot be used as the only reason for which that information would be denied legal effectiveness, validity or enforceability. However, this provision should not be misinterpreted as establishing the absolute legal validity of any given electronic communication or of any information contained therein (see A/CN.9/546, para. 41).

130. No specific rule has been included in the Convention on the time and place of formation of contracts in cases where an offer or the acceptance of an offer is expressed by means of an electronic communications message, in order not to interfere with national law applicable to contract formation. UNCITRAL was of the view that such a provision would exceed the aim of the Convention, which is limited to providing that electronic communications would achieve the same degree of legal certainty as paper-based communications. The combination of existing rules on the formation of contracts with the provisions contained in article 10 of the Convention is designed to dispel uncertainty as to the time and place of formation of contracts in cases where the offer or the acceptance are exchanged electronically (see also paras. 171-196 below).

### *2. Consent to use electronic communications*

131. Provisions similar to paragraph 2 of article 8 have been included in a number of national laws relating to electronic commerce to highlight the principle of party autonomy and make it clear that the legal recognition of electronic communications does not require a party to use or accept them[38] (see also A/CN.9/527, para. 108).

132. However, the consent to use electronic communications does not need to be expressly indicated or be given in any particular form. While absolute certainty can be accomplished by obtaining an explicit contract before relying on electronic

[38]Ibid., para. 52.

communications, such an explicit contract should not be necessary. Indeed, such a requirement would itself be an unreasonable barrier to electronic commerce. Under the Electronic Communications Convention, the consent to use electronic communications is to be found from all circumstances, including the parties' conduct. Examples of circumstances from which it may be found that a party has agreed to conduct transactions electronically include the following: handing out a business card with a business e-mail address; inviting a potential client to visit a company's website or accessing someone's website to place an order; and advertising goods over the Internet or through e-mail.

*References to preparatory work*

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|---|---|
| UNCITRAL, 38th session (Vienna, 4-15 July 2005) | A/60/17, paras. 51-53 |
| Working Group IV, 44th session (Vienna, 11-22 October 2004) | A/CN.9/571, paras. 117-122 |
| Working Group IV, 42nd session (Vienna, 17-21 November 2003) | A/CN.9/546, paras. 44 and 45 |
| Working Group IV, 41st session (New York, 5-9 May 2003) | A/CN.9/528, paras. 94-108; see also paras. 121-131 (on related draft provisions subsequently deleted) |
| Working Group IV, 39th session (New York, 11-15 March 2002) | A/CN.9/509, paras. 86-92; see also paras. 66-73 (on related draft provisions subsequently deleted) |

## *Article 9. Form requirements*

### *1. General remarks*

133. Like the UNCITRAL Model Law on Electronic Commerce, on which it is based, the Electronic Communications Convention relies on what has become known as the "functional equivalence approach" with a view to determining how the purposes or functions of paper-based documents could be fulfilled through electronic-commerce techniques. For example, a paper document may serve any of the following functions: to ensure that a record would be legible by all; to ensure that a record would remain unaltered over time; to allow for the reproduction of a document so that each party would hold a copy of the same data; to allow for the authentication of data by means of a signature; and to provide that a document would be in a form acceptable to public authorities and courts.

134. In respect of all of the above-mentioned functions of paper, electronic records can provide the same level of security as paper and, in most cases, a much higher degree of reliability and speed, especially with respect to the identification of the source and content of the data, provided that a number of technical and legal requirements are met. However, the adoption of the functional-equivalent approach should

not result in imposing on users of electronic commerce more stringent standards of security (and the costs associated with them) than in a paper-based environment.

135. The functional-equivalent approach has been taken in article 9 of the Convention with respect to the concepts of "writing", "signature" and "original" but not with respect to other legal concepts dealt with by domestic law. For example, the Convention does not attempt to create a functional equivalent of existing storage requirements, because record storage requirements often serve administrative and regulatory objectives in connection with matters not directly related to the formation or performance of private contracts (such as taxation, monetary regulation, or customs controls). In view of the public policy considerations related to those objectives and the varying degree of technological development in different countries, it was felt that record storage should be left outside the scope of the Convention.

## *2. Freedom of form*

136. Paragraph 1 of article 9 of the Electronic Communications Convention reflects the general principle of freedom of form, as stated in article 11 of the United Nations Sales Convention, with a view to making it clear that the reference to possible form requirements under other law does not imply that the Electronic Communications Convention itself establishes any form requirement.

137. Nevertheless, the Convention recognizes that form requirements exist and that they may limit the ability of the parties to choose their means of communication. The Convention offers criteria under which electronic communications can meet general form requirements. However, nothing in the Convention implies that the parties have an unlimited right to use the technology or medium of their choice in connection with formation or performance of any type of contract, so as not to interfere with the operation of rules of law that may require, for instance, the use of specific authentication methods in connection with particular types of contract (see A/CN.9/571, para. 119).

138. The Convention does not link the validity of an electronic communication or a contract concluded through electronic means to the use of an electronic signature, as most legal systems do not impose a general signature requirement as a condition for the validity of all types of contract (see A/CN.9/571, para. 118)

## *3. Notion of legal requirement*

139. In certain common law countries the words "the law" would normally be interpreted as referring to common law rules, as opposed to statutory requirements, while in some civil law jurisdictions the word "the law" is typically used to refer narrowly to legislation enacted by Parliament. In the context of the Electronic Communications Convention, however, the words "the law" refer to those various sources of law and are intended to encompass not only statutory or regulatory law, including international conventions or treaties ratified by a contracting State, but also judicially created law and other procedural law.

140. However, the words "the law" do not include areas of law that have not become part of the law of a State and are sometimes referred to by expressions such as "*lex mercatoria*" or "law merchant".[39] This is a corollary of the principle of party autonomy. To the extent that trade usages and practices develop through industry standards, model contracts and guidelines, it should be left for the drafters and users of those instruments to consider when and under what circumstances electronic communications should be admitted or promoted in the context of those instruments. Parties who incorporate into their contracts standard industry terms that do not expressly contemplate electronic communications remain free to adapt the standard terms to their concrete needs.

141. Although the article does not refer to the "applicable" law, it is understood, in the light of criteria used to define the geographic field of application of the Convention, that the "law" referred to in this article is the law that applies to the dealings between the parties in accordance with the relevant rules of private international law.

### *4. Relationship to article 5*

142. As indicated above, the principle of party autonomy does not empower the parties to displace legal form requirements by agreeing to use a standard lower than what is provided in article 9. The provisions on general form requirements in the Electronic Communications Convention are only facilitative in nature. The consequences of parties using different methods would simply be that they would not be able to meet the form requirements contemplated under article 9 (see A/CN.9/548, para. 122).

### *5. Written form*

143. Paragraph 2 of article 9 of the Electronic Communications Convention defines the basic standard that electronic communications need to meet in order to satisfy a requirement that information be retained or presented "in writing" (or that the information be contained in a "document" or other paper-based instrument).

144. In the preparation of the Convention, UNCITRAL paid attention to the functions traditionally performed by various kinds of "writings" in a paper-based environment. National laws require the use of "writings" for various reasons, such as: *(a)* to ensure that there would be tangible evidence of the existence and nature of the intent of the parties to bind themselves; *(b)* to help the parties be aware of the consequences of their entering into a contract; *(c)* to provide that a document would be legible by all; *(d)* to provide that a document would remain unaltered over time and provide a permanent record of a transaction; *(e)* to allow for the reproduction of a document so that each party would hold a copy of the same data; *(f)* to allow for the authentication of data by means of a signature; *(g)* to provide that a document would be in a form acceptable to public authorities and courts;

[39]Ibid., para. 58.

*(h)* to finalize the intent of the author of the "writing" and provide a record of that intent; *(i)* to allow for the easy storage of data in a tangible form; *(j)* to facilitate control and subsequent audit for accounting, tax or regulatory purposes; or *(k)* to bring legal rights and obligations into existence in those cases where a "writing" is required for validity purposes.

145. However, it would be inappropriate to adopt an overly comprehensive notion of the functions performed by a "writing". The requirement of written form is often combined with other concepts distinct from writing, such as signature and original. Thus, the requirement of a "writing" should be considered as the lowest layer in a hierarchy of form requirements, which provides distinct levels of reliability, traceability and integrity with respect to paper documents. The requirement that data be presented in written form (which can be described as a "threshold requirement") should thus not be confused with more stringent requirements such as "signed writing", "signed original" or "authenticated legal act". For example, under certain national laws, a written document that is neither dated nor signed, and the author of which either is not identified in the written document or is identified by a mere letterhead, would still be regarded as a "writing" although it might be of little evidential weight in the absence of other evidence (e.g. testimony) regarding its authorship. Also, the concept of writing does not necessarily denote inalterability since a "writing" in pencil might still be considered a "writing" under certain existing legal definitions. In general, notions such as "evidence" and "intent of the parties to bind themselves" are to be tied to the more general issues of reliability and authentication of the data and should not be included in the definition of a "writing".

146. The purpose of article 9, paragraph 2, is not to establish a requirement that, in all instances, electronic communications should fulfil all conceivable functions of a writing. Rather than focusing upon specific functions that a "writing" may fulfil in a particular context, article 9 focuses on the basic notion of the information being reproduced and read. That notion is expressed in article 9 in terms that were found to provide an objective criterion, namely that the information in an electronic communication must be accessible so as to be usable for subsequent reference. The use of the word "accessible" is meant to imply that information in the form of computer data should be readable and interpretable, and that the software that might be necessary to render such information readable should be retained. The word "usable" is intended to cover both human use and computer processing. The notion of "subsequent reference" was preferred to notions such as "durability" or "non-alterability", which would have established too harsh standards, and to notions such as "readability" or "intelligibility", which might constitute too subjective criteria.

## *6. Signature requirements*

147. The increased use of electronic authentication techniques as substitutes for handwritten signatures and other traditional authentication procedures has created a need for a specific legal framework to reduce uncertainty as to the legal effect that may result from the use of such modern techniques, to which the Electronic Communications Convention generally refers with the expression "electronic

signature". The risk that diverging legislative approaches might be taken in various countries with respect to electronic signatures calls for uniform legislative provisions to establish the basic rules of what is inherently an international phenomenon, where legal harmony as well as technical interoperability are desirable objectives.

### *Notion and types of electronic signatures*

148. In an electronic environment, the original of a message is indistinguishable from a copy, bears no handwritten signature, and is not on paper. The potential for fraud is considerable, due to the ease of intercepting and altering information in electronic form without detection and the speed of processing multiple transactions. The purpose of various techniques currently available on the market or still under development is to offer the technical means by which some or all of the functions identified as characteristic of handwritten signatures can be performed in an electronic environment. Such techniques may be referred to broadly as "electronic signatures".

149. In considering uniform rules on electronic signatures, UNCITRAL has examined various electronic signature techniques currently being used or still under development. The common purpose of those techniques is to provide functional equivalents to *(a)* handwritten signatures; and *(b)* other kinds of authentication mechanisms used in a paper-based environment (e.g. seals or stamps). The same techniques may perform additional functions in the sphere of electronic commerce, which are derived from the functions of a signature but correspond to no strict equivalent in a paper-based environment.

150. Electronic signatures may take the form of "digital signatures" based on public-key cryptography, which are often generated within a "public-key-infrastructure" where the functions of creating and verifying the digital signature are supported by certificates issued by a trusted third party.[40] However, there are various other devices, also covered in the broad notion of "electronic signature", which may currently be used, or considered for future use, with a view to fulfilling one or more of the above-mentioned functions of handwritten signatures. For example, certain techniques would rely on authentication through a biometric device based on handwritten signatures. In such a device, the signatory would sign manually, using a special pen, either on a computer screen or on a digital pad. The handwritten signature would then be analysed by the computer and stored as a set of numerical values, which could be appended to a data message and displayed by the relying party for authentication purposes. Such an authentication system would presuppose that samples of the handwritten signature had been previously analysed and stored by the biometric device. Other techniques would involve the use of personal identification numbers (PINs), digitized versions of handwritten signatures and other methods, such as clicking an "OK box".

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[40]For a detailed description of digital signatures and their applications, see the *Guide to Enactment of the UNCITRAL Model Law on Electronic Signatures*, paras. 31-62 (United Nations publication, Sales No. E.02.V.8).

### *Technological neutrality*

151. Article 9, paragraph 3, is based on the recognition of the functions of a signature in a paper-based environment. In the preparation of the Electronic Communications Convention, the following functions of a signature were considered: to identify a person; to provide certainty as to the personal involvement of that person in the act of signing; and to associate that person with the content of a document. It was noted that, in addition, a signature could perform a variety of functions, depending on the nature of the document that is signed. For example, a signature might attest to the intent of a party to be bound by the content of a signed contract, to endorse authorship of a text, to associate itself with the content of a document written by someone else or to show when and at what time a person had been at a given place.

152. Alongside the traditional handwritten signature, there are several procedures (e.g. stamping and perforation), sometimes also referred to as "signatures", that provide varying levels of certainty. For example, some countries generally require that contracts for the sale of goods above a certain amount should be "signed" in order to be enforceable. However, the concept of signature adopted in that context is such that a stamp, perforation or even a typewritten signature or a printed letterhead might be regarded as sufficient to fulfil the signature requirement. At the other end of the spectrum, there are requirements that combine the traditional handwritten signature with additional security procedures such as the confirmation of the signature by witnesses.

153. In theory, it may seem desirable to develop functional equivalents for the various types and levels of signature requirements in existence, so that users would know exactly the degree of legal recognition that could be expected from the use of the various means of authentication. However, any attempt to develop rules on standards and procedures to be used as substitutes for specific instances of "signatures" might create the risk of tying the legal framework provided by the Convention to a given state of technical development.

154. Therefore, the Convention does not attempt to identify specific technological equivalents to particular functions of handwritten signatures. Instead, it establishes the general conditions under which electronic communications would be regarded as authenticated with sufficient credibility and would be enforceable in the face of signature requirements. Focusing on the two basic functions of a signature, paragraph 3 *(a)* of article 9 establishes the principle that, in an electronic environment, the basic legal functions of a signature are performed by way of a method that identifies the originator of an electronic communication and indicates the originator's intention in respect of the information contained in the electronic communication.

155. Given the pace of technological innovation, the Convention provides criteria for the legal recognition of electronic signatures irrespective of the technology used, for example, digital signatures relying on asymmetric cryptography; biometric

devices (enabling the identification of individuals by their physical characteristics, whether by hand or face geometry, fingerprint reading, voice recognition or retina scan, etc.); symmetric cryptography; the use of PINs; the use of "tokens" as a way of authenticating electronic communications through a smart card or other device held by the signatory; digitized versions of handwritten signatures; signature dynamics; and other methods, such as clicking an "OK box".

### *Extent of legal recognition*

156. The provisions of article 9, paragraph 3, are only intended to remove obstacles to the use of electronic signatures and do not affect other requirements for the validity of the electronic communication to which the electronic signature relates. Under the Convention, the mere signing of an electronic communication by means of a functional equivalent of a handwritten signature is not intended, in and of itself, to confer legal validity on the electronic communication. Whether an electronic communication that fulfils the requirement of a signature has legal validity is to be settled under the law applicable outside the Convention.

157. For the purposes of paragraph 3 of article 9, it is irrelevant whether the parties are linked by prior agreement setting forth procedures for electronic communication (such as a trading partner agreement) or whether they had no prior contractual relationship regarding the use of electronic commerce. The Convention is thus intended to provide useful guidance both in a context where national laws would leave the question of authentication of electronic communications entirely to the discretion of the parties and in a context where requirements for signature, which are usually set by mandatory provisions of national law, should not be made subject to alteration by agreement of the parties.

158. The place of origin of an electronic signature, in and of itself, should in no way be a factor determining whether and to what extent foreign certificates or electronic signatures should be recognized as capable of being legally effective in a contracting State. Determination of whether, or the extent to which, an electronic signature is capable of being legally effective should not depend on the place where the electronic signature was created or where the infrastructure (legal or otherwise) that supports the electronic signature is located, but on its technical reliability.

### *Basic conditions for functional equivalence*

159. According to paragraph 3 *(a)* of article 9, an electronic signature must be capable of identifying the signatory and indicating the signatory's intention in respect of the information contained in the electronic communication.

160. The formulation of paragraph 3 *(a)* differs slightly from the wording of article 7, paragraph 1, of the UNCITRAL Model Law on Electronic Commerce, where reference is made to an indication of the signatory's "approval" of the information contained in the electronic communication. It was noted that there might be instances where the law required a signature, but that signature did not have the function of

indicating the signing party's approval of the information contained in the electronic communication. For example, many countries have requirements of law for notarization of a document by a notary or attestation by a commissioner for oaths. In such cases, the signature of the notary or commissioner merely identifies the notary or commissioner and associates the notary or commissioner with the contents of the document, but does not indicate the approval by the notary or commissioner of the information contained in the document. Similarly, some laws require the execution of a document to be witnessed by witnesses, who may be required to append their signatures to that document. The signatures of the witnesses merely identify them and associate them with the contents of the document witnessed, but do not indicate their approval of the information contained in the document.[41] The current formulation of paragraph 3 *(a)* was agreed upon to make it abundantly clear that the notion of "signature" in the Convention does not necessarily and in all cases imply a party's approval of the entire content of the communication to which the signature is attached.[42]

### *Reliability of signature method*

161. Paragraph 3 *(b)* of article 9 establishes a flexible approach to the level of security to be achieved by the method of identification used under paragraph 3 *(a)*. The method used under paragraph 3 *(a)* should be as reliable as is appropriate for the purpose for which the electronic communication is generated or communicated, in the light of all the circumstances, including any agreement between the originator and the addressee.

162. Legal, technical and commercial factors that may be taken into account in determining whether the method used under paragraph 3 *(a)* is appropriate, include the following: *(a)* the sophistication of the equipment used by each of the parties; *(b)* the nature of their trade activity; *(c)* the frequency at which commercial transactions take place between the parties; *(d)* the kind and size of the transaction; *(e)* the function of signature requirements in a given statutory and regulatory environment; *(f)* the capability of communication systems; *(g)* compliance with authentication procedures set forth by intermediaries; *(h)* the range of authentication procedures made available by any intermediary; *(i)* compliance with trade customs and practice; *(j)* the existence of insurance coverage mechanisms against unauthorized communications; *(k)* the importance and the value of the information contained in the electronic communication; *(l)* the availability of alternative methods of identification and the cost of implementation; *(m)* the degree of acceptance or non-acceptance of the method of identification in the relevant industry or field both at the time the method was agreed upon and the time when the electronic communication was communicated; and *(n)* any other relevant factor.

163. Paragraph 3 *(b)*(i) establishes a "reliability test" with a view to ensuring the correct interpretation of the principle of functional equivalence in respect of

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[41]See *Official Records of the General Assembly, Sixtieth Session, Supplement No. 17* (A/60/17), para. 61.

[42]Ibid., paras. 63 and 64.

electronic signatures. The "reliability test", which appears also in article 7, paragraph 1 *(b)*, of the UNCITRAL Model Law on Electronic Commerce, reminds courts of the need to take into account factors other than technology, such as the purpose for which the electronic communication was generated or communicated, or a relevant agreement of the parties, in ascertaining whether the electronic signature used was sufficient to identify the signatory. Without paragraph 3 *(b)* of article 9 of the Convention, the courts in some States might be inclined to consider, for instance, that only signature methods that employed high-level security devices are adequate to identify a party, despite an agreement of the parties to use simpler signature methods.[43]

164. However, UNCITRAL considered that the Convention should not allow a party to invoke the "reliability test" to repudiate its signature in cases where the actual identity of the party and its actual intention could be proved.[44] The requirement that an electronic signature needs to be "as reliable as appropriate" should not lead a court or trier of fact to invalidate the entire contract on the ground that the electronic signature was not appropriately reliable if there is no dispute about the identity of the person signing or the fact of signing, that is, no question as to authenticity of the electronic signature. Such a result would be particularly unfortunate, as it would allow a party to a transaction in which a signature was required to try to escape its obligations by denying that its signature (or the other party's signature) was valid—not on the ground that the purported signer did not sign, or that the document it signed had been altered, but only on the ground that the method of signature employed was not "as reliable as appropriate" in the circumstances. In order to avoid these situations, paragraph 3 *(b)*(ii) validates a signature method—regardless of its reliability in principle—whenever the method used is proven in fact to have identified the signatory and indicated the signatory's intention in respect of the information contained in the electronic communication.[45]

165. The notion of "agreement" in paragraph 3 *(b)* of article 9 is to be interpreted as covering not only bilateral or multilateral agreements concluded between parties directly exchanging electronic communications (e.g. "trading partners agreements", "communication agreements" or "interchange agreements") but also agreements involving intermediaries such as networks (e.g. "third-party service agreements"). Agreements concluded between users of electronic commerce and networks may incorporate "system rules", i.e. administrative and technical rules and procedures to be applied when communicating electronic communications.

## *7. Electronic originals*

166. If "original" were defined as a medium on which information was fixed for the first time, it would be impossible to speak of "original" electronic communications, since the addressee of an electronic communication would always receive a

[43]Ibid., para. 66.

[44]Ibid., para. 67.

[45]Ibid., paras. 65-67.

copy thereof. However, paragraphs 4 and 5 of article 9 of the Electronic Communications Convention should be put in a different context. The notion of "original" in paragraph 4 is useful since in practice many disputes relate to the question of originality of documents, and in electronic commerce the requirement for presentation of originals constitutes one of the main obstacles that the Convention attempts to remove. Although in some jurisdictions the concepts of "writing", "original" and "signature" may overlap, the Convention approaches them as three separate and distinct concepts.

167. Paragraphs 4 and 5 of article 9 are also useful in clarifying the notions of "writing" and "original", in particular in view of their importance for purposes of evidence. Examples of documents that might require an "original" are trade documents such as weight certificates, agricultural certificates, quality or quantity certificates, inspection reports, insurance certificates, etc. While such documents are not negotiable or used to transfer rights or title, it is essential that they be transmitted unchanged, that is in their "original" form, so that other parties in international commerce may have confidence in their contents. In a paper-based environment, these types of document are usually only accepted if they are "original" to lessen the chance that they have been altered, which would be difficult to detect in copies. Various technical means are available to certify the contents of an electronic communication to confirm its "originality". Without this functional equivalent of originality, the sale of goods using electronic commerce would be hampered since the issuers of such documents would be required to retransmit their electronic communication each and every time the goods are sold, or the parties would be forced to use paper documents to supplement the electronic commerce transaction.

168. Paragraphs 4 and 5 should be regarded as stating the minimum acceptable form requirement to be met by an electronic communication in order for it to be regarded as the functional equivalent of an original. These provisions should be regarded as mandatory, to the same extent that existing provisions regarding the use of paper-based original documents would be regarded as mandatory. The indication that the form requirements stated in paragraphs 4 and 5 are to be regarded as the "minimum acceptable" should not, however, be construed as inviting States to establish requirements stricter than those contained in the Convention by way of declarations made under article 19, paragraph 2.

169. Paragraphs 4 and 5 emphasize the importance of the integrity of the information for its originality and set out criteria to be taken into account when assessing integrity by reference to systematic recording of the information, assurance that the information was recorded without lacunae and protection of the data against alteration. It links the concept of originality to a method of authentication and puts the focus on the method of authentication to be followed in order to meet the requirement. It is based on the following elements: a simple criterion as to "integrity" of the data; a description of the elements to be taken into account in assessing the integrity; and an element of flexibility in the form of a reference to the surrounding circumstances. As regards the words "the time when it was first generated in

its final form" in paragraph 4 *(a)*, it should be noted that the provision is intended to encompass the situation where information was first composed as a paper document and subsequently transferred on to a computer. In such a situation, paragraph 4 *(a)* is to be interpreted as requiring assurances that the information has remained complete and unaltered from the time when it was composed as a paper document onwards, and not only as from the time when it was translated into electronic form. However, where several drafts were created and stored before the final message was composed, paragraph 4 *(a)* should not be misinterpreted as requiring assurance as to the integrity of the drafts.

170. Paragraph 5 of article 9 sets forth the criteria for assessing integrity, taking care to except necessary additions to the first (or "original") electronic communication such as endorsements, certifications, notarizations etc. from other alterations. As long as the contents of an electronic communication remain complete and unaltered, necessary additions to that electronic communication would not affect its "originality". Thus, when an electronic certificate is added to the end of an "original" electronic communication to attest to the "originality" of that electronic communication, or when data is automatically added by computer systems at the start and the finish of an electronic communication in order to transmit it, such additions would be considered as if they were a supplemental piece of paper with an "original" piece of paper, or the envelope and stamp used to send that "original" piece of paper.

*References to preparatory work*

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## *Article 10. Time and place of dispatch and receipt of electronic communications*

### *1. Purpose of the article*

171. When the parties deal through more traditional means, the effectiveness of the communications they exchange depends on various factors, including the time of their receipt or dispatch, as appropriate. Although some legal systems have general rules on the effectiveness of communications in a contractual context, in many legal systems general rules are derived from the specific rules that govern the

effectiveness of offer and acceptance for purposes of contract formation. The essential question before UNCITRAL was how to formulate rules on time of receipt and dispatch of electronic communications that adequately transpose to the context of the Electronic Communications Convention the existing rules for other means of communication.

172. Domestic rules on contract formation often distinguish between "instantaneous" and "non-instantaneous" communications of offer and acceptance or between communications exchanged between parties present at the same place at the same time (*inter praesentes*) or communications exchanged at a distance (*inter absentes*). Typically, unless the parties engage in "instantaneous" communication or are negotiating face-to-face, a contract will be formed when an "offer" to conclude the contract has been expressly or tacitly "accepted" by the party or parties to whom it was addressed.

173. Leaving aside the possibility of contract formation through performance or other actions implying acceptance, which usually involves a finding of facts, the controlling factor for contract formation where the communications are not "instantaneous" is the time when an acceptance of an offer becomes effective. There are currently four main theories for determining when an acceptance becomes effective under general contract law, although they are rarely applied in pure form or for all situations.

174. Pursuant to the "declaration" theory, a contract is formed when the offeree produces some external manifestation of its intent to accept the offer, even though this may not yet be known to the offeror. According to the "mailbox rule", which is traditionally applied in most common law jurisdictions, but also in some countries belonging to the civil law tradition, acceptance of an offer is effective upon dispatch by the offeree (for example, by placing a letter in a mailbox). In turn, under the "reception" theory, which has been adopted in several civil law jurisdictions, the acceptance becomes effective when it reaches the offeror. Lastly, the "information" theory requires knowledge of the acceptance for a contract to be formed. Of all these theories, the "mailbox rule" and the reception theory are the most commonly applied for business transactions.

175. In preparing article 10 of the Electronic Communications Convention, UNCITRAL recognized that contracts other than sales contracts governed by the rules on contract formation in the United Nations Sales Convention are in most cases not subject to a uniform international regime. Different legal systems use various criteria to establish when a contract is formed and UNCITRAL took the view that it should not attempt to provide a rule on the time of contract formation that might be at variance with the rules on contract formation of the law applicable to any given contract (see A/CN.9/528, para. 103; see also A/CN.9/546, paras. 119-121). Instead, the Convention offers guidance that allows for the application, in the context of electronic contracting, of the concepts traditionally used in international conventions and domestic law, such as "dispatch" and "receipt" of communications. To the extent that those traditional concepts are essential for the application of rules

on contract formation under domestic and uniform law, UNCITRAL considered that it was very important to provide functionally equivalent concepts for an electronic environment (see A/CN.9/528, para. 137).

176. However, article 10, paragraph 2, does not address the efficacy of the electronic communication that is sent or received. Whether a communication is unintelligible or unusable by a recipient is therefore a separate issue from whether that communication was sent or received. The effectiveness of an illegible communication, or whether it binds any party, are questions left to other law.

### *2. "Dispatch" of electronic communications*

177. Paragraph 1 of article 10 of the Electronic Communications Convention follows in principle the rule set out in article 15 of the UNCITRAL Model Law on Electronic Commerce, although it provides that the time of dispatch is when the electronic communication leaves an information system under the control of the originator rather than the time when the electronic communication enters an information system outside the control of the originator.[46] The definition of "dispatch" as the time when an electronic communication left an information system under the control of the originator—as distinct from the time when it entered another information system—was chosen so as to mirror more closely the notion of "dispatch" in a non-electronic environment (see A/CN.9/571, para. 142), which is understood in most legal systems as the time when a communication leaves the originator's sphere of control. In practice, the result should be the same as under article 15, paragraph 1, of the UNCITRAL Model Law on Electronic Commerce, since the most easily accessible evidence to prove that a communication has left an information system under the control of the originator is the indication, in the relevant transmission protocol, of the time when the communication was delivered to the destination information system or to intermediary transmission systems.

178. Article 10 also covers situations where an electronic communication has not left an information system under the control of the originator. This hypothesis, which is not covered in article 15 of the UNCITRAL Model Law on Electronic Commerce, may happen, for example, when the parties exchange communications through the same information system or network, so that the electronic communication never really enters a system under the control of another party. In such cases, dispatch and receipt of the electronic communication coincide.

### *3. "Receipt" of electronic communications*

179. The time of receipt of an electronic communication is the time when it becomes capable of being retrieved by the addressee at an electronic address designated by the addressee. This is presumed to occur when the electronic communication reaches the addressee's electronic address. Paragraph 2 of article 10 is based on a similar rule in article 15, paragraph 2, of the UNCITRAL Model Law on Electronic Commerce, although with a different wording.

[46]Ibid., para. 78.

*"Capable of being retrieved"*

180. Paragraph 2 of article 10 is conceived as a set of presumptions, rather than a firm rule on receipt of electronic communications. Paragraph 2 aims at achieving an equitable allocation of the risk of loss of electronic communications. It takes into account the need to offer the originator an objective default rule to establish whether a message can be seen as having been received or not. At the same time, however, paragraph 2 recognizes that concerns over security of information and communications in the business world have led to the increased use of security measures such as filters or firewalls which might prevent electronic communications from reaching their addressees. Using a notion common to many legal systems, and reflected in domestic enactments of the UNCITRAL Model Law on Electronic Commerce, this paragraph requires that an electronic communication be capable of being retrieved in order to be deemed to have been received by the addressee. This requirement is not contained in the Model Law, which focuses on timing and defers to national law on whether electronic communications need to meet other requirements (such as "processability") in order to be deemed to have been received.[47]

181. The legal effect of retrieval falls outside the scope of the Convention and is left for the applicable law. Like article 24 of the United Nations Sales Convention, paragraph 2 is not concerned with national public holidays and customary working hours, elements that would have led to problems and to legal uncertainty in an instrument that applied to international transactions (see A/CN.9/571, para. 159).

182. By the same token, the Electronic Communications Convention does not intend to overrule provisions of domestic law under which receipt of an electronic communication may occur at the time when the communication enters the sphere of the addressee, irrespective of whether the communication is intelligible or usable by the addressee. Nor is the Convention intended to run counter to trade usages, under which certain encoded messages are deemed to be received even before they are usable by, or intelligible for, the addressee. It was felt that the Convention should not create a more stringent requirement than currently existed in a paper-based environment, where a message can be considered to be received even if it is not intelligible for the addressee or not intended to be intelligible to the addressee (for example, where encrypted data is transmitted to a depository for the sole purpose of retention in the context of protection of intellectual property rights).

183. Despite the different wording used, the effect of the rules on receipt of electronic communications in the Electronic Communications Convention is consistent with article 15 of the UNCITRAL Model Law on Electronic Commerce. As is the case under article 15 of the Model Law, the Convention retains the objective test of entry of a communication into an information system to determine when an electronic communication is presumed to be "capable of being retrieved" and therefore

[47]See, on this particular point, a comparative study conducted by the Secretariat contained in document A/CN.9/WG.IV/WP.104/Add.2, paras. 10-31, available at http://www.uncitral.org/uncitral/en/commission/working_groups/4Electronic_Commerce.html.

"received". The requirement that an electronic communication should be capable of being retrieved, which is presumed to occur when the communication reaches the addressee's electronic address, should not be seen as adding an extraneous subjective element to the rule contained in article 15 of the Model Law. In fact "entry" in an information system is understood under article 15 of the Model Law as the time when an electronic communication "becomes available for processing within that information system",[48] which is arguably also the time when the communication becomes "capable of being retrieved" by the addressee.

184. Whether or not an electronic communication is indeed "capable of being retrieved" is a factual matter outside the Convention. UNCITRAL took note of the increasing use of security filters (such as "spam" filters) and other technologies restricting the receipt of unwanted or potentially harmful communications (such as communications suspected of containing computer viruses). The presumption that an electronic communication becomes capable of being retrieved by the addressee when it reaches the addressee's electronic address may be rebutted by evidence showing that the addressee had in fact no means of retrieving the communication[49] (see also A/CN.9/571, paras. 149 and 160).

### *"Electronic address"*

185. Similar to a number of domestic laws, the Convention uses the term "electronic address", instead of "information system", which was the expression used in the Model Law. In practice, the new terminology, which appears in other international instruments such as the Uniform Customs and Practices for Documentary Credits ("UCP 500") Supplement for Electronic Presentation ("eUCP"),[50] should not lead to any substantive difference. Indeed, the term "electronic address" may, depending on the technology used, refer to a communications network, and in other instances could include an electronic mailbox, a telecopy device or another specific "portion or location in an information system that a person uses for receiving electronic messages" (see A/CN.9/571, para. 157).

186. The notion of "electronic address", like the notion of "information system", should not be confused with information service providers or telecommunications carriers that might offer intermediary services or technical support infrastructure for the exchange of electronic communications (see A/CN.9/528, para. 149).

### *"Designated" and "non-designated" electronic addresses*

187. The Electronic Communications Convention retains the distinction made in article 15 of the Model Law between delivery of messages to specifically

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[48]See the *Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce* (United Nations publication, Sales No. E.99.V.4), para. 103.

[49]See *Official Records of the General Assembly, Sixtieth Session, Supplement No. 17* (A/60/17), para. 80.

[50]See James E. Byrne and Dan Taylor, *ICC Guide to the eUCP: Understanding the Electronic Supplement to the UCP 500*, (Paris, ICC Publishing S.A., 2002) (ICC publication No. 639), p. 54.

designated electronic addresses and delivery of messages to an address not specifically designated. In the first case, the rule of receipt is essentially the same as under article 15, paragraph (2) *(a)*(i), of the Model Law, that is, a message is received when it reaches the addressee's electronic address (or "enters" the addressee's "information system" in the terminology of the Model Law). The Convention does not contain specific provisions as to how the designation of an information system should be made, or whether the addressee could make a change after such a designation.

188. In distinguishing between designated and non-designated electronic addresses, paragraph 2 aims at establishing a fair allocation of risks and responsibilities between originator and addressee. In normal business dealings, parties who own more than one electronic address could be expected to take the care of designating a particular one for the receipt of messages of a certain nature and to refrain from disseminating electronic addresses they rarely use for business purposes. By the same token, however, parties should be expected not to address electronic communications containing information of a particular business nature (e.g. acceptance of a contract offer) to an electronic address they know or ought to know would not be used to process communications of such a nature (e.g. an e-mail address used to handle consumer complaints). It would not be reasonable to expect that the addressee, in particular large business entities, should pay the same level of attention to all the electronic addresses it owns (see A/CN.9/528, para. 145).

189. One noticeable difference between the Electronic Communications Convention and the UNCITRAL Model Law on Electronic Commerce, however, concerns the rules for receipt of electronic communications sent to a non-designated address. The Model Law distinguishes between communications sent to an information system other than the designated one and communications sent to any information system of the addressee in the absence of any particular designation. In the first case, the Model Law does not regard the message as being received until the addressee actually retrieves it. The rationale behind this rule is that if the originator chooses to ignore the addressee's instructions and sends the electronic communication to an information system other than the designated system, it would not be reasonable to consider the communication as having been delivered to the addressee until the addressee has actually retrieved it. In the second situation, however, the underlying assumption of the Model Law was that for the addressee it was irrelevant to which information system the electronic communication would be sent, in which case it would be reasonable to presume that it would accept electronic communications through any of its information systems.

190. In this particular situation, the Convention follows the approach taken in a number of domestic enactments of the Model Law and treats both situations in the same manner. Thus for all cases where the message is not delivered to a designated electronic address, receipt under the Convention only occurs when *(a)* the electronic communication becomes capable of being retrieved by the addressee (by reaching an electronic address of the addressee) and *(b)* the addressee actually becomes aware that the communication was sent to that particular address.

191. In cases where the addressee has designated an electronic address, but the communication was sent elsewhere, the rule in the Convention is not different in result from article 15, paragraph (2) *(a)*(ii), of the Model Law, which itself requires, in those cases, that the addressee retrieves the message (which in most cases would be the immediate evidence that the addressee has become aware that the electronic communication has been sent to that address).

192. The only substantive difference between the Convention and the Model Law, therefore, concerns the receipt of communications in the absence of any designation. In this particular case, UNCITRAL agreed that practical developments since the adoption of the Model Law justified a departure from the original rule. It also considered, for instance, that many persons have more than one electronic address and could not be reasonably expected to anticipate receiving legally binding communications at all addresses they maintain.[51]

### *Awareness of delivery*

193. The addressee's awareness that the electronic communication has been sent to a particular non-designated address is a factual manner that could be proven by objective evidence, such as a record of notice given otherwise to the addressee, or a transmission protocol or other automatic delivery message stating that the electronic communication had been retrieved or displayed at the addressee's computer.

## *4. Place of dispatch and receipt*

194. The purpose of paragraphs 3 and 4 of article 10 is to deal with the place of receipt of electronic communications. The principal reason for including these rules is to address a characteristic of electronic commerce that may not be treated adequately under existing law, namely, that very often the information system of the addressee where the electronic communication is received, or from which the electronic communication is retrieved, is located in a jurisdiction other than that in which the addressee itself is located. Thus, the rationale behind the provision is to ensure that the location of an information system is not the determinant element, and that there is some reasonable connection between the addressee and what is deemed to be the place of receipt and that this place can be readily ascertained by the originator.

195. Paragraph 3 contains a firm rule and not merely a presumption. Consistent with its objective of avoiding a duality of regimes for online and offline transactions and taking the United Nations Sales Convention as a precedent, where the focus was on the actual place of business of the party, the phrase "deemed to be" has been chosen deliberately to avoid attaching legal significance to the use of a server in a particular jurisdiction other than the jurisdiction where the place of

[51]See *Official Records of the General Assembly, Sixtieth Session, Supplement No. 17* (A/60/17), para. 82.

business is located simply because that was the place where an electronic communication had reached the information system where the addressee's electronic address is located.[52]

196. The effect of paragraph 3 therefore is to introduce a distinction between the deemed place of receipt and the place actually reached by an electronic communication at the time of its receipt under paragraph 2. This distinction is not to be interpreted as apportioning risks between the originator and the addressee in case of damage or loss of an electronic communication between the time of its receipt under paragraph 2 and the time when it reached its place of receipt under paragraph 3. Paragraph 3 establishes a rule on location to be used where another body of law (e.g. on formation of contracts or conflict of laws) requires determination of the place of receipt of an electronic communication.

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| Working Group IV, 44th session (Vienna, 11-22 October 2004) | A/CN.9/571, paras. 140-166 |
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## *Article 11. Invitations to make offers*

### *1. Purpose of the article*

197. Article 11 of the Electronic Communications Convention is based on article 14, paragraph 1, of the United Nations Sales Convention. Its purpose is to clarify an issue that has raised considerable debate since the advent of the Internet, namely the extent to which parties offering goods or services through open, generally accessible communication systems, such as an Internet website, are bound by advertisements made in this way (see A/CN.9/509, para. 75).

198. In a paper-based environment, advertisements in newspapers, radio and television, catalogues, brochures, price lists or other means not addressed to one or more specific persons, but generally accessible to the public, are regarded as invitations to submit offers (according to some legal writers, even in those cases where they are directed to a specific group of customers), since in such cases the intention to be bound is considered to be lacking. By the same token, the mere display of goods in shop windows and on self-service shelves is usually regarded as an

[52]Ibid., para. 83.

invitation to submit offers. This understanding is consistent with article 14, paragraph 2, of the United Nations Sales Convention, which provides that a proposal other than a proposal addressed to one or more specific persons is to be considered as merely an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal (see A/CN.9/509, para. 76).

199. In keeping with the principle of media neutrality, UNCITRAL took the view that the solution for online transactions should not be different from the solution used for equivalent situations in a paper-based environment. UNCITRAL therefore agreed that, as a general rule, a company that advertises goods or services on the Internet or through other open networks should be considered as merely inviting those who accessed the site to make offers. Thus, an offer of goods or services through the Internet does not prima facie constitute a binding offer (see A/CN.9/509, para. 77).

## *2. Rationale for the rule*

200. If the United Nations Sales Convention's notion of "offer" is transposed to an electronic environment, a company that advertises its goods or services on the Internet or through other open networks should be considered to be merely inviting those who access the site to make offers. Thus, an offer of goods or services through the Internet would not prima facie constitute a binding offer.

201. The difficulty that may arise in this context is how to strike a balance between a trader's possible intention (or lack thereof) of being bound by an offer, on the one hand, and the protection of relying on parties acting in good faith, on the other. The Internet makes it possible to address specific information to a virtually unlimited number of persons and current technology permits contracts to be concluded nearly instantaneously, or at least creates the impression that a contract has been so concluded.

202. In legal literature, it has been suggested that that the "invitation to treat" model might not be appropriate for uncritical transposition to an Internet environment (see A/CN.9/WG.IV/WP.104/Add.1, paras. 4-7). One possible criterion for distinguishing between a binding offer and an invitation to treat may be based on the nature of the applications used by the parties. Legal writings on electronic contracting have proposed a distinction between websites offering goods or services through interactive applications and those that use non-interactive applications. If a website only offers information about a company and its products and any contact with potential customers lies outside the electronic medium, there would be little difference from a conventional advertisement. However, an Internet website that uses interactive applications may enable negotiation and immediate conclusion of a contract (in the case of virtual goods even immediate performance). Legal writings on electronic commerce have proposed that such interactive applications might be regarded as an offer "open for acceptance while stocks last", as opposed to an "invitation to treat". This proposition is at least at first sight consistent with legal thinking for traditional transactions. Indeed, the notion of offers to the public that are

binding upon the offeror "while stocks last" is recognized also for international sales transactions.

203. In support of this approach, it has been argued that parties acting upon offers of goods or services made through the use of interactive applications might be led to assume that offers made through such systems were firm offers and that by placing an order they might be validly concluding a binding contract at that point in time. Those parties, it has been said, should be able to rely on such a reasonable assumption in view of the potentially significant economic consequences of contract frustration, in particular in connection with purchase orders for commodities or other items with highly fluctuating prices. Attaching consequence to the use of interactive applications, it was further said, might help enhance transparency in trading practices by encouraging business entities to state clearly whether or not they accepted to be bound by acceptance of offers of goods or services or whether they were only extending invitations to make offers (see A/CN.9/509, para. 81).

204. UNCITRAL considered these arguments carefully. The final consensus was that the potentially unlimited reach of the Internet called for caution in establishing the legal value of these "offers". It was found that attaching a presumption of binding intention to the use of interactive applications would be detrimental for sellers holding a limited stock of certain goods, if the seller were to be liable to fulfil all purchase orders received from a potentially unlimited number of buyers (see A/CN.9/546, para. 107). In order to avert that risk, companies offering goods or services through a website that uses interactive applications enabling negotiation and immediate processing of purchase orders for goods or services frequently indicate in their websites that they are not bound by those offers. UNCITRAL felt that, if this was already the case in practice, the Convention should not reverse it (see A/CN.9/509, para. 82; see also A/CN.9/528, para. 116).

### *3. Notion of interactive applications and intention to be bound in case of acceptance*

205. The general principle that offers of goods or services that are accessible to an unlimited number of persons are not binding applies even when the offer is supported by an interactive application. Typically an "interactive application" is a combination of software and hardware for conveying offers of goods and services in a manner that allows for the parties to exchange information in a structured form with a view to concluding a contract automatically. The expression "interactive applications" focuses on what is apparent to the person accessing the system, namely that it is prompted to exchange information through that information system by means of immediate actions and responses having an appearance of automaticity.[53] It is irrelevant how the system functions internally and to what extent it is really automated (e.g. whether other actions, by human intervention or through the use of other equipment, might be required in order to effectively conclude a contract or process an order) (see A/CN.9/546, para. 114).

[53]Ibid., para. 87.

206. UNCITRAL recognized that in some situations it may be appropriate to regard a proposal to conclude a contract that was supported by interactive applications as evidencing the party's intent to be bound in case of acceptance. Some business models are indeed based on the rule that offers through interactive applications are binding offers. In those cases, possible concerns about the limited availability of the relevant product or service are often addressed by including disclaimers stating that the offers are for a limited quantity only and by the automatic placement of orders according to the time they were received (see A/CN.9/546, para. 112). UNCITRAL also noted that some case law seemed to support the view that offers made by so-called "click-wrap" agreements and in Internet auctions may be interpreted as binding (see A/CN.9/546, para. 109; see also A/CN.9/WG.IV/WP.104/Add.1, paras. 11-17). However, the extent to which such intent indeed exists is a matter to be assessed in the light of all the circumstances (for example, disclaimers made by the vendor or the general terms and conditions of the auction platform). As a general rule, UNCITRAL considered that it would be unwise to presume that persons using interactive applications to make offers always intended to make binding offers, because that presumption would not reflect the prevailing practice in the marketplace (see A/CN.9/546, para. 112).

207. It should be noted that a proposal to conclude a contract only constitutes an offer if a number of conditions are fulfilled. For a sales contract governed by the United Nations Sales Convention, for example, the proposal must be sufficiently definite by indicating the goods and expressly or implicitly fixing or making provision for determining the quantity and the price.[54] Article 11 of the Electronic Communications Convention is not intended to create special rules for contract formation in electronic commerce. Accordingly, a party's intention to be bound would not suffice to constitute an offer in the absence of those other elements (see A/CN.9/546, para. 111).

*References to preparatory work*

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|---|---|
| UNCITRAL, 38th session (Vienna, 4-15 July 2005) | A/60/17, paras. 85-88 |
| Working Group IV, 44th session (Vienna, 11-22 October 2004) | A/CN.9/571, paras. 167-172 |
| Working Group IV, 42nd session (Vienna, 17-21 November 2003) | A/CN.9/546, paras. 106-116 |
| Working Group IV, 41st session (New York, 5-9 May 2003) | A/CN.9/528, paras. 109-120 |
| Working Group IV, 39th session (New York, 11-15 March 2002) | A/CN.9/509, paras. 74-85 |

[54]United Nations Sales Convention, article 14, paragraph 1.

## *Article 12. Use of automated message systems for contract formation*

### *1. Purpose of the article*

208. Automated message systems, sometimes called "electronic agents", are being used increasingly in electronic commerce and have caused scholars in some legal systems to revisit traditional legal theories of contract formation to assess their adequacy to contracts that come into being without human intervention.

209. Existing uniform law conventions do not seem in any way to preclude the use of automated message systems, for example for issuing purchase orders or processing purchase applications. This seems to be the case in connection with the United Nations Sales Convention, which allows the parties to create their own rules, for example in an EDI trading partner agreement regulating the use of "electronic agents". The UNCITRAL Model Law on Electronic Commerce also lacks a specific rule on the matter. While nothing in the Model Law seems to create obstacles to the use of fully automated message systems, it does not deal specifically with those systems, except for the general rule on attribution in article 13, paragraph 2 *(b)*.

210. Even if no modification appeared to be needed in general rules of contract law, UNCITRAL considered that it would be useful for the Electronic Communications Convention to make provisions to facilitate the use of automatic message systems in electronic commerce. A number of jurisdictions have found it necessary or at least useful to enact similar provisions in domestic legislation on electronic commerce (see A/CN.9/546, paras. 124-126). Article 12 of the Convention embodies a non-discrimination rule intended to make it clear that the absence of human review of or intervention in a particular transaction does not by itself preclude contract formation. Therefore, while a number of reasons may otherwise render a contract invalid under domestic law, the sole fact that automated message systems were used for purposes of contract formation will not deprive the contract of legal effectiveness, validity or enforceability.

### *2. Attribution of actions performed by automated message systems*

211. At present, the attribution of actions of automated message systems to a person or legal entity is based on the paradigm that an automated message system is capable of performing only within the technical structures of its preset programming. However, at least in theory it is conceivable that future generations of automated information systems may be created with the ability to act autonomously and not just automatically. That is, through developments in artificial intelligence, a computer may be able to learn through experience, modify the instructions in its own programs and even devise new instructions.

212. Already during the preparation of the Model Law on Electronic Commerce, UNCITRAL had taken the view that that, while the expression "electronic agent" had been used for purposes of convenience, the analogy between an automated

message system and a sales agent was not appropriate. General principles of agency law (for example, principles involving limitation of liability as a result of the faulty behaviour of the agent) could not be used in connection with the operation of such systems. UNCITRAL also considered that, as a general principle, the person (whether a natural person or a legal entity) on whose behalf a computer was programmed should ultimately be responsible for any message generated by the machine (see A/CN.9/484, paras. 106 and 107).

213. Article 12 of the Electronic Communications Convention is an enabling provision and should not be misinterpreted as allowing for an automated message system or a computer to be made the subject of rights and obligations. Electronic communications that are generated automatically by message systems or computers without direct human intervention should be regarded as "originating" from the legal entity on behalf of which the message system or computer is operated. Questions relevant to agency that might arise in that context are to be settled under rules outside the Convention.

### *3. Means of indicating assent and extent of human intervention*

214. When a contract is formed by the interaction of an automated message system and a natural person, or by the interaction of automated message systems, there are several ways to indicate the contracting parties' assent. Computers may exchange messages automatically according to an agreed standard, or a person may indicate assent by touching or clicking on a designated icon or place on a computer screen. Article 12 of the Electronic Communications Convention does not attempt to illustrate the ways in which assent may be expressed out of a concern to respect technological neutrality and because any illustrative list would carry the risk of being incomplete or becoming dated, as other means of indicating assent not expressly mentioned might already be in use or might possibly become widely used in the future (see A/CN.9/509, para. 89).

215. The central rule in the article is that the validity of a contract does not require human review of each of the individual actions carried out by the automated message system or the resulting contract. For the purposes of article 12 of the Convention, it is irrelevant whether all message systems involved are fully automated or merely semi-automated (for example, where some actions are only effected following some form of human intervention), as long as at least one of them does not need human "review or intervention", to complete its task (see A/CN.9/527, para. 114).

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| UNCITRAL, 38th session (Vienna, 4-15 July 2005) | A/60/17, paras. 89-92 |
| Working Group IV, 44th session (Vienna, 11-22 October 2004) | A/CN.9/571, paras. 173 and 174 |
| Working Group IV, 39th session (New York, 11-15 March 2002) | A/CN.9/509, paras. 99-103 |

## *Article 13. Availability of contract terms*

### *1. Contract terms in electronic commerce*

216. Except for purely oral transactions, most contracts negotiated through traditional means result in some tangible record of the transaction to which the parties can refer in case of doubt or dispute. In electronic contracting, such a record, which may exist as a data message, may be retained only temporarily or may be available only to the party through whose information system the contract was concluded. Thus, some recent legislation on electronic commerce requires that a person offering goods or services through information systems accessible to the public should provide means for storage or printing of the contract terms.

217. The rationale for creating such specific obligations seems to be an interest in enhancing legal certainty, transparency and predictability in international transactions concluded by electronic means. Thus, some domestic regimes require certain information to be provided or technical means to be offered in order to make available contract terms in a way that allows for their storage and reproduction, in the absence of a prior agreement between the parties, such as a trading partner agreement or other type of agreement.

218. Domestic laws contemplate a wide variety of consequences for failure to comply with requirements concerning the availability of contract terms negotiated electronically. Some legal systems provide that failure to make the contract terms available constitutes an administrative offence and subject the infringer to payment of a fine. In other jurisdictions, the law gives the customer the right to seek an order from any court having jurisdiction in relation to the contract requiring that service provider to comply with that requirement. Under yet other systems, the consequence is an extension of the period within which a consumer may avoid the contract, which does not begin to run until the time when the merchant has complied with its obligations. In most cases, these sanctions do not exclude other consequences that may be provided in law, such as sanctions under fair competition laws.

### *2. Non-interference with domestic requirements*

219. UNCITRAL considered carefully the desirability of including provisions that required a party to make available the terms of contracts negotiated electronically. It was noted that no similar obligations existed under the United Nations Sales Convention or most international instruments dealing with commercial contracts. UNCITRAL was therefore faced with the question of whether, as a matter of principle, it should propose specific obligations for parties conducting business electronically that did not exist when they contracted through more traditional means.

220. UNCITRAL recognized that, when parties negotiated through open networks, such as the Internet, there may be a concrete risk that they would be requested to agree to certain terms and conditions displayed by a vendor, but might not have access to those terms and conditions at a later stage. This situation, which does not

only concern consumers, as it may happen in negotiations between business entities or professional traders, may be unfavourable to the party accepting the contractual terms of the other party. It was argued that this problem did not have the same magnitude in the non-electronic environment, since, except for purely oral contracts, the parties would in most cases have access to a tangible record of the terms governing their contract (see A/CN.9/546, para. 134). It was also argued that a duty to make available the terms of contracts negotiated electronically, and possibly also subsequent changes in standard contractual conditions, would encourage good business practice and would be equally beneficial for business-to-business and for business-to-consumer commerce (see A/CN.9/571, para. 178).

221. The final decision, however, was not in favour of introducing a duty to make available contract terms, as it was felt that that approach would result in imposing rules that did not exist in the context of paper-based transactions, thus departing from the policy that the Electronic Communications Convention should not create a duality of regimes governing paper-based contracts on the one hand and electronic transactions on the other (see A/CN.9/509, para. 123). It was also considered that it would not be feasible to formulate an appropriate set of possible consequences for failure to comply with a requirement to make available contract terms and that it would be pointless to establish this type of duty in the Convention if no sanction was created (see A/CN.9/571, para. 179). For example, UNCITRAL discarded the possibility of rendering commercial contracts invalid for failure to comply with a duty to make contract terms available, because of the unprecedented nature of that solution, as other texts, such as the United Nations Sales Convention, had not dealt with the validity of contracts. On the other hand, providing for other types of sanction, such as tort liability or administrative sanctions, was felt to be outside the scope of a uniform instrument on commercial law (see A/CN.9/571, para. 177).

222. Article 13 of the Convention was retained as a reminder for parties that the facilitative rules on the Convention did not relieve them from any obligation they may have to comply with domestic legal requirements that may impose a duty to make contract terms available, for instance, pursuant to regulatory regimes governing the provision of online services, especially under consumer protection regulations (see A/CN.9/509, para. 63).

### *3. Nature of legal requirements on availability of contract terms*

223. The phrase “any rule of law” in this article has the same meaning as the words “the law” in article 9. They encompass statutory, regulatory and judicially created laws as well as procedural laws but do not cover laws that have not become part of the law of the State, such as *lex mercatoria*, even though the expression “rules of law” is sometimes used in that broader meaning.[55]

[55]See *Official Records of the General Assembly, Sixtieth Session, Supplement No. 17* (A/60/17), para. 94.

*References to preparatory work*

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| UNCITRAL, 38th session (Vienna, 4-15 July 2005) | A/60/17, paras. 93 and 94 |
| Working Group IV, 44th session (Vienna, 11-22 October 2004) | A/CN.9/571, paras. 175-181 |
| Working Group IV, 42nd session (Vienna, 17-21 November 2003) | A/CN.9/546, paras. 130-135 |
| Working Group IV, 39th session (New York, 11-15 March 2002) | A/CN.9/509, paras. 122-125 |

## *Article 14. Error in electronic communications*

### *1. Electronic commerce and errors*

224. The question of mistakes and errors is closely related to the use of automated message systems in electronic commerce. Such errors may be either the result of human actions (for example, typing errors) or the consequence of malfunctioning of the message system used.

225. Recent legislation on electronic commerce, including some domestic enactments of the UNCITRAL Model Law, contain provisions dealing with errors made by natural persons when dealing with an automated computer system of another person, typically by setting out the conditions under which a natural person is not bound by a contract in the event that the person made an error in an electronic communication. The rationale for these provisions seems to be the relatively higher risk that an error made in transactions involving a natural person, on the one hand, and an automated computer system, on the other, might not be noticed, as compared with transactions that involve only natural persons. Errors made by the natural person in such a situation may become irreversible once acceptance is dispatched. Indeed, in a transaction between individuals there is a greater ability to correct the error before parties have acted on it. However, when an individual makes an error while dealing with the automated message system of the other party, it may not be possible to correct the error before the other party has shipped or taken other action in reliance on the erroneous communication.

226. UNCITRAL considered carefully the desirability of dealing with errors in the Electronic Communications Convention. It was noted that the UNCITRAL Model Law on Electronic Commerce, which was not concerned with substantive issues that arose in contract formation, did not deal with the consequences of mistake and error in electronic contracting. Furthermore, article 4, subparagraph *(a)*, of the United Nations Sales Convention expressly provided that matters related to the validity of a sales contract were excluded from its scope, although other international texts, such as the Principles of International Commercial Contracts of the International Institute for the Unification of Private Law (Unidroit), dealt with the consequences of errors for the validity of the contract, albeit restrictively.[56]

[56]Unidroit Principles of International Commercial Contracts, arts. 3.5 and 3.6.

227. UNCITRAL was mindful of the need to avoid undue interference with well-established notions of contract law and to avoid creating specific rules for electronic transactions that might vary from rules that applied to other modes of negotiation. Nevertheless, it felt that there was a need for a specific provision dealing with narrowly defined types of error in the light of the relatively higher risk of human errors being made in online transactions made through automated message systems than in more traditional modes of contract negotiation (see A/CN.9/509, para. 105). The contract law of some legal systems further confirms the need for the article, for example in view of rules that require a party seeking to avoid the consequences of an error to show that the other party knew or ought to have known that a mistake had been made. While there are means of making such proof if there is an individual at each end of the transaction, awareness of the mistake is almost impossible to demonstrate when there is an automated process at the other end (see A/CN.9/548, para. 18).

## *2. Scope and purpose of the article*

228. Article 14 of the Electronic Communications Convention applies to a very specific situation. It is only concerned with errors that occur in transmissions between a natural person and an automated message system when the system does not provide the person with the possibility to correct the error. The conditions for withdrawal or avoidance of electronic communications affected by errors that occur in any other context are left for domestic law.[57]

229. The article deals only with errors made by a natural person, as opposed to a computer or other machine. However, the right to withdraw the portion of the electronic communication is not a right of the natural person but of the party on whose behalf the person was acting (see A/CN.9/548, para. 22).

230. Generally, errors made by any automated system should ultimately be attributable to the persons on whose behalf the system is operated. However, already during the preparation of the UNCITRAL Model Law on Electronic Commerce, it was argued that some circumstances might call for a mitigation of that principle, such as when an automated system generated erroneous messages in a manner that could not have reasonably been anticipated by the person on whose behalf the messages were sent. In practice, the extent to which the party on whose behalf an automated message system is operated is responsible for all its actions may depend on various factors such as the extent to which the party has control over the software or other technical aspects used in programming the system (see A/CN.9/484, para. 108). Given the complexity of those questions, in respect of which domestic law may give varying answers depending on the factual situation, it was felt that it would not be appropriate to attempt to formulate uniform rules at the current stage and that jurisprudence should be allowed to evolve.

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[57]See *Official Records of the General Assembly, Sixtieth Session, Supplement No. 17* (A/60/17), para. 96.

### *3. "Opportunity to correct errors"*

231. Article 14 authorizes a party who makes an error to withdraw the portion of the electronic communication where the error was made if the automated message system did not provide the person with an opportunity to correct errors. The article does oblige the party on whose behalf the automated message system operates to make available procedures for detecting and correcting errors in electronic contract negotiation.

232. UNCITRAL considered the desirability of introducing such a general obligation, as an alternative for dealing with the rights of the parties after an error had occurred. Such an obligation exists in some domestic systems, but the consequences for a party's failure to provide procedures for detecting and correcting errors in electronic contract negotiation vary greatly from country to country. In some jurisdictions, such failure constitutes an administrative offence and subjects the infringer to payment of a fine. In other countries, the consequence is either to entitle a customer to rescind the contract or to extend the period within which a consumer may unilaterally cancel an order. The type of consequence provided in each case depends on the type of regulatory approach taken to electronic commerce. During the preparation of the Electronic Communications Convention it was felt that, however desirable such an obligation might be in the interest of promoting good business practices, the Convention would not be an appropriate place for it, since the Convention could not provide a complete system of sanctions appropriate for all circumstances (see A/CN.9/509, para. 108). The agreement eventually reached on this point was that, instead of requiring generally that an opportunity to correct errors should be provided, the Convention should limit itself to providing a remedy for the person making the error (see A/CN.9/548, para. 19).

233. Article 14 of the Electronic Communications Convention deals with the allocation of risks concerning errors in electronic communications in a fair and sensible manner. An electronic communication can only be withdrawn if the automated message system did not provide the originator with an opportunity to correct the error before sending the electronic communication. If no such system is in place, the party on whose behalf the automated message system operates bears the risk of errors that may occur. Thus, the article gives an incentive to parties acting through automated message systems to build in safeguards that enable their contract partners to prevent the sending of an erroneous communication, or correct the error once sent. For example, the automated message system may be programmed to provide a "confirmation screen" to the person setting forth all the information the individual initially approved. This would provide the person with the ability to prevent the erroneous communication from ever being sent. Similarly, the automated message system might receive the communication sent by the person and then send back a confirmation which the person must again accept before the transaction is completed. This would allow for correction of an erroneous communication. In either case, the automated message system would "provide an opportunity to correct the error," and the article would not apply. Rather, other law would govern the effect of any error.

## *4. Notion and proof of "input error"*

234. Article 14 of the Electronic Communications Convention is only concerned with "input" errors, that is, errors relating to inputting wrong data in communications exchanged with an automated message system. These are typically unintentional keystroke errors, which are felt to be potentially more frequent in transactions made through automated information systems than in more traditional modes of contract negotiation. For example, while it would be unlikely for a person to deliver documents unintentionally to a post office, in practice there were precedents where persons had claimed not to have intended to confirm a contract by hitting "Enter" on a computer keyboard or clicking on an "I agree" icon on a computer screen.

235. The article is not intended to be media-neutral, since it deals with a specific issue affecting certain forms of electronic communications. In doing so, article 14 does not overrule existing law on error, but merely offers a meaningful addition to it by focusing on the importance of providing means of having the error corrected (see A/CN.9/548, para. 17). Other types of error are left for the general doctrine of error under domestic law (see A/CN.9/571, para. 190).

236. As is already the case in a paper-based environment, the factual determination as to whether or not an input error has indeed occurred is a matter that needs to be assessed by the courts in the light of the entire evidence and relevant circumstances, including the overall credibility of a party's assertions (see A/CN.9/571, para. 186). The right to withdraw an electronic communication is an exceptional remedy to protect a party in error and not a blank opportunity for parties to repudiate disadvantageous transactions or nullify what would otherwise be valid legal commitments freely accepted. This right is justified by the consideration that a reasonable person in the position of the originator would not have issued the electronic communication, had that person been aware of the error at that time. However, article 14 does not require a determination of the intent of the party who sent the allegedly erroneous message. If the operator of the automated message system fails to offer means for correcting errors despite the clear incentive to do so in article 14, it is reasonable to make such party bear the risk of errors being made in electronic communications exchanged through the automated message system. Limiting the right of the party in error to withdraw the messages would not further the intended goal of the provision to encourage parties to provide for an error-correction method in automated message systems.[58]

## *5. "Withdraw"*

237. Article 14 does not invalidate an electronic communication in which an input error is made. It only gives the person in error the right to "withdraw" the portion of the electronic communication in which the error was made. The term "withdraw" was deliberately used instead of other alternatives, such as "avoiding the

[58]Ibid., para. 97.

consequences" of the electronic communication or similar expressions that might be interpreted as referring to the validity of an act and lead to discussions as to whether the act was null and void or avoidable at the party's request.

238. Furthermore, article 14 does not provide for a right to "correct" the error made. During the preparation of the Convention it was argued that the remedy should be limited to the correction of an input error, so as to reduce the risk that a party would allege an error as an excuse to withdraw from an unfavourable contract. Another proposal was that the person who has made an input error should have a choice to "correct or withdraw" the electronic communication in which the error was made. This possibility, it was argued, would cover both situations where correction was the appropriate remedy for the error (such as typing the wrong quantity in an order) and situations where withdrawal would be a better remedy (such as when a person has unintentionally hit a wrong key or an "I agree" button and sent a message he or she did not intend to send) (see A/CN.9/571, para. 193).

239. After extensive consideration of those options, UNCITRAL agreed that the person who has made an error should only have the right to withdraw the portion of the electronic communication in which the error was made. In most legal systems, the typical consequence of an error is to make it possible for the party in error to avoid the effect of the transaction resulting from its error, but not necessarily to restore the original intent and enter into a new transaction. While withdrawal may in most cases equate to nullification of a communication, correction would require the possibility to modify the previous communication. UNCITRAL was not willing to create a general right to "correct" erroneous communications, as this would have introduced additional costs for system providers and would leave given remedies with no parallel in the paper world, a result which UNCITRAL had previously agreed to avoid. A right to correct electronic communications would also cause practical difficulties, as operators of automated message systems may more readily provide an opportunity to nullify a communication already recorded than an opportunity to correct errors after a transaction has been concluded. Furthermore, a right to correct errors would have entailed that an offeror who has received an electronic communication later alleged to contain errors must keep its original offer open since the other party would have effectively replaced the withdrawn communication.[59]

### *6. The "portion of the electronic communication in which the input error was made"*

240. The right to withdraw relates only to the part of the electronic communication where the error was made, if the information system so allows. This has the dual scope of granting to parties the possibility to redress errors in electronic communications, when no means of correcting errors are made available, and of preserving as much as possible the effects of the contract, by correcting only the portion vitiated by the error, in line with the general principle of preservation of contracts (see A/CN.9/571, para. 195).

[59]Ibid., para. 98.

241. Article 14 does not expressly establish the consequences of the withdrawal of the portion of an electronic communication in which an error was made. It is understood that, depending on the circumstances, the withdrawal of a portion of an electronic communication may invalidate the entire communication or render it ineffective for purposes of contract formation.[60] For example, if the portion withdrawn contains the reference to the nature of the goods being ordered, the electronic communication would not be "sufficiently definite" for purposes of contract formation under article 14, paragraph 1, of the United Nations Sales Convention. The same conclusion should apply if the portion withdrawn concerns price or quantity of goods and there are no other elements left in the electronic communication according to which they could be determined. However, withdrawal of a portion of the electronic communication that concerns matters that are not, by themselves or pursuant to the intent of the parties, essential elements of the contract, may not necessarily devoid the entire electronic communication of its effectiveness.

## *7. Conditions for withdrawing an electronic communication*

242. Paragraphs 1 *(a)* and *(b)* of article 14 establish two conditions for a party to exercise the right to withdraw: to notify the other party as soon as possible, and not to have used or received any material benefit or value from the goods or services, if any, received from the other party.

243. UNCITRAL considered extensively whether the right to withdraw the electronic communication should be limited in any way, in particular as the conditions contemplated in article 14 may differ from the consequences of avoidance of contracts under some legal systems (see A/CN.9/548, para. 23). It was, however, felt that the conditions set forth in paragraphs 1 *(a)* and 1 *(b)* provided a useful remedy for cases in which the automated message system proceeded to deliver physical or virtual goods or services immediately upon conclusion of the contract, with no possibility to stop the process. UNCITRAL considered that in those cases paragraphs 1 *(a)* and 1 *(b)* provided a fair basis for the exercise of the right of withdrawal and would also tend to limit abuses by parties acting in bad faith (see A/CN.9/571, para. 203).

### *(a) Notice of error and time limit for withdrawing an electronic communication*

244. Paragraph 1 *(a)* of article 14 requires the natural person or the party on whose behalf the person was acting to take prompt action to advise the other party of the error and of the fact that the individual did not intend to approve the electronic communication. Whether the action is prompt must be determined from all the circumstances including the person's ability to contact the other party. The natural person or the party on whose behalf the person was acting should advise the other party both of the error and of the lack of intention to be bound (i.e. avoidance) by

[60]Ibid., para. 100.

the portion of the electronic communication in which the error occurred. However, the party receiving the message should be able to rely on the message, despite the error, up to the point of receiving a notice of error (see A/CN.9/548, para. 24).

245. In some domestic systems that require the operator of automated message systems used for contract formation to provide an opportunity to correct errors, the right to withdraw or avoid a communication must be exercised at the moment of reviewing the communication before dispatch. Under those systems, the party who makes an error cannot withdraw the communication after it has been confirmed. Article 14 does not limit the right to withdrawal in this way, since in practice, a party may only become aware that it has made an error at a later stage, for instance, when it receives goods of a type or in a quantity different from what it had originally intended to order (see A/CN.9/571, para. 191).

246. Furthermore, article 14 does not deal with the time limit for exercising the right of withdrawal in case of input error, as time limits are a matter of public policy in many legal systems. Nevertheless, the parties are not exposed to indefinite withdrawal. The combined impact of paragraphs 1 *(a)* and *(b)* of article 14 limits the time within which an electronic communication could be withdrawn, since withdrawal has to occur "as soon as possible", but in any event not later than the time when the party has used or received any material benefit or value from the goods or services received from the other party.[61]

### *(b) Loss of right to withdraw an electronic communication*

247. It should be noted that goods or services may have been provided on the basis of an allegedly erroneous communication before receipt of the notice required by paragraph 1 *(a)* of article 14. Paragraph 1 *(b)* avoids unjustified windfalls to the natural person or the party on whose behalf that person was acting by erecting stringent requirements before the party in error may exercise the right of withdrawal under the paragraph. Under this provision, a party loses the right to withdrawal when it has received material benefits or value from the vitiated communication.[62]

248. UNCITRAL recognized that such a limitation in the right to invoke an error in order to avoid the consequences of a legally relevant act may not exist in all legal systems under general contract law. The risk of illegitimate windfalls for a person who successfully avoids a contract is usually dealt with by legal theories such as restitution or unjust enrichment. Nevertheless, it was felt that the particular context of electronic commerce justified establishing a particular rule to avoid that risk.

249. Various transactions in electronic commerce may be concluded nearly instantaneously and generate immediate value or benefit for the party purchasing the relevant goods or services. In many cases, it may be impossible to restore the conditions

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[61]Ibid., para. 103.

[62]Ibid., para. 102.

as they existed prior to the transaction. For example, if the consideration received is information in electronic form, it may not be possible to avoid the benefit conferred. While the medium containing the information could be returned, mere access to the information, or the ability to redistribute the information, would constitute a benefit that could not be returned. It may also occur that the mistaken party receives consideration that changes in value between the time of receipt and the first opportunity to return. In such a case restitution cannot be made adequately. In all these cases it would not be equitable to allow that, by withdrawing the portion of the electronic communication in which an error was made, a party could avoid the entire transaction while effectively retaining the benefit gained from it. This limitation is further important in view of the large number of electronic transactions involving intermediaries that may be harmed because transactions cannot be unwound.

### *8. Relationship to general law on mistake*

250. The underlying purpose of article 14 is to provide a specific remedy in respect of input errors that occur under particular circumstances and not to interfere with the general doctrine on error under domestic laws.[63] If the conditions set forth in paragraph 1 of article 14 are not met (that is, if the error is not an "input" error made by a natural person, or if the automated message system did in fact provide the person with an opportunity to correct the error), the consequences of the error would be as provided for by other laws, including the law on error, and by any agreement between the parties (see A/CN.9/548, para. 20).

*References to preparatory work*

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|---|---|
| UNCITRAL, 38th session (Vienna, 4-15 July 2005) | A/60/17, paras. 95-103 |
| Working Group IV, 44th session (Vienna, 11-22 October 2004) | A/CN.9/571, paras. 182-206 |
| Working Group IV, 43rd session (New York, 15-19 March 2004) | A/CN.9/548, paras. 14-26 |
| Working Group IV, 39th session (New York, 11-15 March 2002) | A/CN.9/509, paras. 99 and 104-111 |

## CHAPTER IV. FINAL PROVISIONS

### *Article 15. Depositary*

251. Articles 15 to 25 form part of the final provisions of the Electronic Communications Convention. Most of them are customary provisions in multilateral treaties and are not intended to create rights and obligations for private parties. However, as these provisions regulate the extent to which a contracting State is

[63]Ibid., para. 104.

bound by the Convention, including the time the Convention or any declaration submitted thereunder enter into force, they may affect the ability of the parties to rely on the provisions of the Convention.

252. Article 15 designates the Secretary-General of the United Nations as depositary of the Convention. The depositary is entrusted with the custody of the authentic texts of the Convention and of any full powers delivered to the depositary and performs a number of administrative services in connection therewith, such as preparing certified copies of the original text; receiving signatures to the Convention and receiving and keeping custody of any instruments, notifications and communications relating to it; and informing the contracting States and the States entitled to become contracting States of acts, notifications and communications relating to the Convention.

*References to preparatory work*

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| UNCITRAL, 38th session (Vienna, 4-15 July 2005) | A/60/17, paras. 106 and 107 |
| Working Group IV, 44th session (Vienna, 11-22 October 2004) | A/CN.9/571, para. 10 |

## *Article 16. Signature, ratification, acceptance or approval*

### *1. The "all States" formula*

253. According to a formula frequently used in multilateral treaties in order to promote the widest possible participation, article 16 declares the Electronic Communications Convention open for signature by "all States".

254. It should be noted, however, that the Secretary-General, as depositary, has stated on a number of occasions that it would fall outside his competence to determine whether a territory or other such entity would fall within the "all States" formula. Pursuant to a general understanding adopted by the General Assembly on 14 December 1973, in discharging his functions as a depositary of a convention with the "all States" clause, the Secretary-General will follow the practice of the General Assembly and, whenever advisable, will request the opinion of the Assembly before receiving a signature or an instrument of ratification or accession.[64]

### *2. Consent to be bound by ratification, acceptance, approval or accession*

255. While some treaties provide that States may express their consent to be legally bound by signature alone, the Electronic Communications Convention, like

[64]See *United Nations Juridical Yearbook, 1973* (United Nations publication, Sales No. E.75.V.1), part two, chap. IV, sect. A.3 (p. 79, note 9), and ibid., *1974* (United Nations publication, Sales No. E.76.V.1), part two, chap. VI, sect. A.9 (pp. 157-159).

most modern multilateral treaties, provides that it is subject to ratification, acceptance or approval by the signatory States. Providing for signature subject to ratification, acceptance or approval allows States time to seek approval for the Convention at the domestic level and to enact any legislation necessary to implement the Convention internally, prior to undertaking the legal obligations from the Convention at the international level. Upon ratification, the Convention legally binds the States.

256. Acceptance or approval of a treaty following signature has the same legal effect as ratification, and the same rules apply. Accession has the same legal effect as ratification, acceptance or approval. However, unlike ratification, acceptance or approval, which must be preceded by signature, accession requires only the deposit of an instrument of accession. Accession as a means of becoming party to a treaty is generally used by States wishing to express their consent to be bound by a treaty if, for whatever reason, they are unable to sign it. This may occur if the deadline for signature has passed or if domestic circumstances prevent a State from signing a treaty.

*References to preparatory work*

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| UNCITRAL, 38th session (Vienna, 4-15 July 2005) | A/60/17, paras. 108-110 |
| Working Group IV, 44th session (Vienna, 11-22 October 2004) | A/CN.9/571, para. 10 |

## *Article 17. Participation by regional economic integration organizations*

### *1. Notion of "regional economic integration organization"*

257. In addition to "States", the Electronic Communications Convention allows participation by international organizations of a particular type, namely "regional economic integration organizations". In introducing this article, which had not appeared in its previous texts, UNCITRAL acknowledged the growing importance of regional economic integration organizations, which are already allowed to participate in several trade-related treaties, including recent international conventions in the field of international commercial law, such as the Unidroit Convention on International Interests in Mobile Equipment (Cape Town, 2001)[65] (the "Cape Town Convention").

258. The Electronic Communications Convention does not contain a definition of "regional economic integration organizations". Nevertheless, it could be said that the notion of "regional economic integration organizations" used in article 17 encompasses two key elements: the grouping of States in a certain region for the realization of common purposes, and the transfer of competencies relating to those

[65]Available at http://www.unidroit.org/english/conventions/mobile-equipment/main.htm.

common purposes from the members of the regional economic integration organization to the organization.

259. Although the notion of "regional economic integration organization" is a flexible one, participation in the Convention is not open to international organizations at large. It was noted that, at the current stage, most international organizations did not have the power to enact legally binding rules having a direct effect on private contracts, since that function typically required the exercise of certain attributes of State sovereignty that only few organizations, typically regional economic integration organizations, had received from their member States.[66]

### *2. Extent of competence of the regional economic integration organization*

260. The Electronic Communications Convention is not concerned with the internal procedures leading to signature, acceptance, approval or accession by a regional economic integration organization. The Convention itself does not require a separate act of authorization by the member States of the organization and does not answer, in one way or the other, the question as to whether a regional economic integration organization has the right to ratify the convention if none of its member States decides to do so. For the Convention, the extent of treaty powers given to a regional economic integration organization is an internal matter concerning the relations between the organization and its own member States. Article 17 does not prescribe the manner in which regional economic integration organizations and their member States divide competences and powers among themselves.[67]

261. Notwithstanding its neutral approach in respect of the internal affairs of a regional economic integration organization, the Convention only allows ratification by an organization that "has competence over certain matters governed by this Convention", as clearly stated in paragraph 1 of article 17. This competence needs further to be demonstrated by a declaration made to the depositary pursuant to paragraph 2 of the article, specifying the matters governed by the Convention in respect of which competence has been transferred to that organization by its member States. Article 17 does not provide a basis for ratification if the regional economic integration organization has no competence on the subject matter covered by the Convention.[68]

262. However, the regional economic integration organization does not need to have competence over all the matters covered by the Convention, which admits that such competence may be partial or concurrent. Regional economic integration organizations typically derive their powers from their member States. By their very nature, as international organizations, regional economic integration organizations have

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[66]See *Official Records of the General Assembly, Sixtieth Session, Supplement No. 17* (A/60/17), para. 113.

[67]Ibid., para. 114.

[68]Ibid., para. 116.

competences in the areas that have been expressly or implicitly transferred to their sphere of activities. Several provisions of the Convention, in particular those in chapter IV, imply the exercise of full State sovereignty and the Convention is not in its entirety capable of being applied by a regional economic integration organization. Furthermore, the legislative authority over the substantive matters dealt with by the Convention may be shared to some extent between the organization and its member States.[69]

### *3. Coordination between regional economic integration organizations and their member States*

263. By acceding to the Electronic Communications Convention, a regional economic integration organization becomes a contracting party in its own right and has, therefore, the right to submit declarations excluding or including matters in the scope of application of the Convention pursuant to articles 19 and 20. The Convention itself does not set forth mechanisms to ensure the consistency between declarations made by a regional economic integration organization and those made by its member States.

264. Possible inconsistencies between declarations submitted by a regional economic integration organization and declarations submitted by its member States would create considerable uncertainty in the application of the Convention and deprive private parties of the ability to easily ascertain beforehand to which matters the Convention applied in respect of which States. They would therefore be highly undesirable.[70]

265. In practice, however, it is expected that conflicting declarations by a regional economic integration organization and its member States would be unlikely. Indeed, paragraph 2 of article 17 already imposes a high standard of coordination by requiring the regional economic integration organization to declare the specific matters for which it has competence. Under normal circumstances, careful consultations would take place, as a result of which, if declarations under article 19 or 20 were found to be necessary, there would be a set of common declarations for the matters in respect of which the regional economic integration organization was competent, which would be mandatory for all member States of the organization. Differing declarations from member States would thus be limited to matters in which no exclusive competence had been transferred from member States to the regional economic integration organization, or matters particular to the State making a declaration, as might be the case, for example, of declarations under article 20, paragraphs 2 to 4, since member States of regional economic integration organizations may not necessarily be contracting States to the same international conventions or treaties.[71]

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[69]Ibid., para. 116.

[70]Ibid., para. 115.

[71]Ibid., para. 117.

266. In any event, there is an obvious need for ensuring consistency between declarations made by regional economic integration organizations and declarations made by their member States. Private parties in third countries should be able to ascertain without inordinate effort when the member States and when the organization have the power to make a particular declaration.[72] There was a strong consensus within UNCITRAL that contracting States to the Convention would be entitled to expect that a regional economic integration organization that had ratified the Convention, and its own member States, would take the necessary steps to avoid conflicts in the manner in which they applied the Convention.[73]

### *4. Relationship between the Convention and rules enacted by regional economic integration organizations*

267. Paragraph 4 of article 17 regulates the relationship between the Electronic Communications Convention and rules enacted by a regional economic integration organization. It provides that the provisions of the Convention shall not prevail over any conflicting rules of any regional economic integration organization as applicable to parties whose respective places of business are located in member States of any such organization, as set out by a declaration made in accordance with article 21.

268. The purpose of this exception is to avoid interference with rules enacted by a regional economic integration organization to harmonize private commercial law within the territory of the organization with a view to facilitating the establishment of an internal market among its member States. In giving priority to conflicting rules of a regional economic integration organization, UNCITRAL recognized that measures to promote legal harmonization among member States of a regional economic integration organization might create a situation that was in many respects analogous to the situation in countries where sub-sovereign jurisdictions, such as states or provinces, had legislative authority over private law matters. It was felt that for matters subject to regional legal harmonization, the entire territory covered by a regional economic integration organization deserved to be treated in a similar way as a single domestic legal system.[74]

269. While paragraph 4 of article 17 sets forth a rule that has not appeared in this form in previous instruments prepared by UNCITRAL, the principle of deference to particular regional regimes embodied in this provision is not entirely new. Article 94 of the United Nations Sales Convention, for example, acknowledges the right of States with similar laws in respect of matters covered by that Convention to declare that their domestic laws take precedence over the provisions of the United Nations Sales Convention in respect of contracts concluded between parties located in their territories.

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[72]Ibid., para. 115.

[73]Ibid., para. 118.

[74]Ibid., para. 119.

270. In view of the fact that legal harmonization promoted by a regional economic integration organization may not necessarily cover the entire range of issues dealt with by the Electronic Communications Convention, the exception in paragraph 4 of article 17 does not operate automatically. The priority status of regional rules needs therefore to be set out in a declaration submitted under article 21. The declaration contemplated in paragraph 4 would be submitted by the regional economic integration organization itself, and is distinct from, and without prejudice to, declarations by States under article 19, paragraph 2. If no such organization adheres to the Convention, their member States who wish to do so would still have the right to include, among the other declarations that they may wish to make, a declaration of the type contemplated in paragraph 4 of article 17 in view of the broad scope of article 19, paragraph 2. It was understood that if a State did not make such a declaration, paragraph 4 would not automatically apply.[75]

*References to preparatory work*

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| UNCITRAL, 38th session (Vienna, 4-15 July 2005) | A/60/17, paras. 111-123 |
| Working Group IV, 44th session (Vienna, 11-22 October 2004) | A/CN.9/571, para. 10 |

## *Article 18. Effect in domestic territorial units*

### *1. The "federal clause"*

271. Article 18 permits a contracting State, at the time of signature, ratification, acceptance, approval or accession, to declare that the Electronic Communications Convention is to extend to all its territorial units or only to one or more of them and to amend its declaration by submitting another declaration at any time. This provision, often called "the federal clause", is of interest to relatively few States—federal systems where the central Government lacks treaty power to establish uniform law for the subject matter covered by the Convention. Article 18 addresses this problem by providing that a State may declare that the Convention will apply "only to one or more" of its territorial units—an option that permits a State to adopt the Convention with its applicability limited to those units (e.g. provinces) which have enacted legislation to implement the Convention.

272. The effect of the provision is therefore on the one hand to permit federal States to apply the Convention progressively to their territorial units and on the other to permit those States that wish to do so to extend its application to all their territorial units from the very outset. Paragraph 2 of article 18 provides for the declarations to be notified to the depositary and to state expressly the territorial units to which the Convention extends. If no declaration is submitted, the Convention will extend to all territorial units of that State in accordance with paragraph 4.

[75]Ibid., para. 122.

273. It should be noted however that a State that has two or more territorial units is only entitled to make the declaration under article 18 if different systems of law apply in those units in relation to the matters dealt with in the Convention. Unlike earlier texts in which this clause had appeared, article 18, paragraph 1, does not make reference to the contracting State's constitution as the basis of the existence of different systems of law in the State concerned. This slight modification, which follows recent practice in other international uniform law instruments,[76] should not alter the way the "federal clause" operates.

## *2. Operation in practice*

274. Paragraph 3 of article 18 makes it clear that, for the purposes of the Electronic Communications Convention, a place of business is not considered to be located in a contracting State when that place of business is located in a territorial unit of a contracting State to which unit that State has not extended the Convention. The consequences of paragraph 3 will depend on whether or not the contracting State whose laws apply to an exchange of electronic communications has made a declaration pursuant to article 19, paragraph 1 *(a)*. If such a declaration exists, the Convention would not apply. However, if the applicable law is the law of a contracting State that has not made this declaration, the Convention would nevertheless apply, as article 1, paragraph 1, does not require that both parties be located in contracting States (see above, paras. 60-64).

275. The wording in the negative, completed by the proviso "unless [the place of business] is in a territorial unit to which the Convention extends" was chosen so as to avoid creating the misleading impression that the Convention might apply to a contract concluded between parties with places of business in different territorial units of the same contracting State to which the Convention had been extended by that State.

276. Article 18 should be read in conjunction with article 6, paragraph 2. Thus, for example, if a large company has places of business in more than one territorial unit of a federal State, not all of which are located in territorial units to which the Convention extends, the decisive factor, in the absence of an indication of a place of business, is the place of business that has the closest relationship to the contract to which the electronic communications relate.

*References to preparatory work*

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| UNCITRAL, 38th session (Vienna, 4-15 July 2005) | A/60/17, paras. 124 and 125 |
| Working Group IV, 44th session (Vienna, 11-22 October 2004) | A/CN.9/571, para. 10 |

[76]Ibid., para. 125.

## *Article 19. Declarations on the scope of application*

### *1. Nature of declarations*

277. The possibility for contracting States to make declarations aimed at adjusting the scope of application of a particular convention is not uncommon in private international law and commercial law conventions. In this area of treaty practice, they are not regarded as reservations—which the Convention does not permit—and do not have the same consequences as reservations under public international law (see also paras. 311-317 below).

### *2. Declarations on the geographic scope of application of the Convention*

278. As noted above, pursuant to article 1, paragraph 1, the Electronic Communications Convention applies whenever the parties exchanging electronic communications have their places of business in different States, even if those States are not contracting States to the Convention, as long as the law of a contracting State is the applicable law. Article 19, paragraph 1 *(a),* allows contracting States to declare, however, that notwithstanding article 1, paragraph 1, they will apply the Convention only when both States where the parties have their places of business are contracting States to the Convention. This type of declaration will have the following practical consequences:

*(a) Forum State is a contracting State that has made a declaration under article 19, paragraph 1 (a).* The Convention will have "autonomous" application and will therefore apply to the exchange of electronic communications between parties located in different contracting States regardless of whether the rules of private international law of the forum State lead to the application of the laws of that State or of another State;

*(b) Forum State is a contracting State that has not made a declaration under article 19, paragraph 1 (a).* The applicability of the Convention will depend on three factors: *(a)* whether the rules of private international law point to the law of the forum State, of another contracting State or of a non-contracting State; *(b)* whether the State the law of which is made applicable under the rules of private international law of the forum State has made a declaration pursuant to article 19, paragraph 1 *(a);* and, if so, *(c)* whether or not both parties have their places of business in different contracting States. Accordingly, if the applicable law is the law of a contracting State that has made a declaration under paragraph 1 *(a),* the Convention applies only if both parties have their places of business in different contracting States. If the applicable law is the law of the forum State or of another contracting State that has not made this declaration, the Convention applies even if the parties do not have their places of business in different contracting States. If the applicable law is the law of a non-contracting State, the Convention does not apply;

*(c) Forum State is a non-contracting State.* The Convention will apply, mutatis mutandis, under the same conditions as described in paragraph 278 *(b)* above.

279. The possibility for contracting States to make this declaration has been introduced so as to facilitate accession to the Convention by States that prefer the enhanced legal certainty offered by an autonomous scope of application, which allows the parties to know beforehand, and independently from rules of private international law, when the Convention applies.

### *3. Limitation based on the choice of the parties*

280. Paragraph 1 *(b)* of article 19 contemplates a possible limitation in the scope of application of the Convention. Under this provision, a State may declare that it will apply the Convention only when the parties to a contract have agreed that the Convention applies to the electronic communications exchanged by them. When introducing this possibility, UNCITRAL was aware that a declaration of this type would, in practice, considerably reduce the applicability of the Convention and deprive a State making the declaration of default uniform rules for the use of electronic communications between parties to an international contract that had not agreed on detailed contract rules for the matters covered by the Convention.

281. Another argument against permitting this type of declaration was that it might give rise to some uncertainty on the application of the Convention in non-party States whose rules of private international law directed the courts to the application of the laws of a contracting State that had made such a declaration.[77] Some legal systems would accept agreements to subject a contract to the laws of a contracting State, but would not recognize the right of the parties to incorporate the terms of the Convention as such into their contract on the grounds that an international convention on private law matters would only have legal effect for private parties to the extent that the convention in question has been given effect domestically. Thus, choice-of-law clauses referring to an international convention would usually be enforced in those countries as incorporation of foreign law, but not as enforcement of the international convention as such (see A/CN.9/548, para. 95).

282. The countervailing view was that many legal systems would not create obstacles to the enforcement of a clause choosing an international convention as applicable law. Furthermore, disputes involving international contracts are not solved exclusively by State courts, and arbitration is a widespread practice in international trade. Arbitral tribunals are often not specifically linked to any particular geographic location and often rule on the disputes submitted to them on the basis of the law chosen by the parties. In practice, choice-of-law clauses do not always refer to the laws of particular States, as parties often choose to subject their contracts to international conventions independently from the laws of any given jurisdiction (see A/CN.9/548, para. 96).

283. UNCITRAL agreed to retain the possibility for States to submit a declaration pursuant to paragraph 1 *(b)* of article 19, as a means of promoting wider adoption of the Convention. It was felt that paragraph 1 *(b)* offered those States which might have difficulties in accepting the general application of the Convention under

[77] Ibid., para. 128.

its article 1, paragraph 1, the possibility to allow their nationals to choose the Convention as applicable law.[78]

### *4. Exclusion of specific matters under paragraph 2*

284. In preparing the Electronic Communications Convention, UNCITRAL aimed at achieving as wide as possible application. General exclusions under article 2, which apply to all contracting States, have accordingly been kept to a minimum. It was recognized, at the same time, that the degree of acceptance of electronic communications still varied greatly among legal systems and that several jurisdictions still excluded certain matters or types of transaction from the scope of legislation intended to facilitate the use of electronic communications. It was also acknowledged that some legal systems, while accepting electronic communications in connection with certain types of transaction, sometimes subjected them to specific requirements, for instance as regarded the type of electronic signature that the parties may use. Other countries, however, may take a more liberal approach, so that matters excluded or subject to particular requirements in some countries may not be excluded or subject to any special requirement in other countries.

285. In view of that diversity of approaches, UNCITRAL agreed that contracting States should be given the possibility of excluding certain matters from the scope of application of the Convention by means of declarations submitted under article 21. In adopting this approach, UNCITRAL was mindful of the fact that unilateral exclusions by way of declarations under article 21 were not in theory conducive to enhancing legal certainty. Nevertheless, it was felt that such a system would allow States to limit the application of the Convention as deemed best, while the adoption of a list of exemptions would have the effect to impose those exclusions even for States that saw no reason for preventing the parties to the excluded transactions from using electronic communications (see A/CN.9/571, para. 63).

286. The types of matter that may be excluded may include matters that some States currently exclude from the scope of domestic legislation enacted to promote electronic commerce (for examples, see para. 82 above). Another type of exclusion might be a declaration limiting the application of the Convention only to the use of electronic communications in connection with contracts covered by international conventions listed in article 20, paragraph 1, although UNCITRAL was of the view that such a declaration, while possible under the broad terms of article 19, paragraph 2, would not further the desired goal of ensuring the broadest possible application of the Convention and should not be encouraged.[79]

*References to preparatory work*

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| UNCITRAL, 38th session (Vienna, 4-15 July 2005) | A/60/17, paras. 126-130 |
| Working Group IV, 44th session (Vienna, 11-22 October 2004) | A/CN.9/571, paras. 28-46 |
| Working Group IV, 43rd session (New York, 15-19 March 2004) | A/CN.9/548, paras. 27-37 |

[78]Ibid.

[79]Ibid., para. 129.

## *Article 20. Communications exchanged under other international conventions*

### *1. Origin and purpose of the article*

287. When it first considered the possibility of further work on electronic commerce after the adoption of the UNCITRAL Model Law on Electronic Signatures, UNCITRAL contemplated, among other issues, a topic broadly referred to as "electronic contracting" and measures that might be needed to remove possible legal obstacles to electronic commerce under existing international conventions. After UNCITRAL Working Group IV (Electronic Commerce) had reviewed the initial draft of what later became the Electronic Communications Convention, at its thirty-ninth session (see A/CN.9/509, paras. 18-125), and following the Secretariat's survey of possible legal obstacles to electronic commerce under existing international conventions (see A/CN.9/WG.IV/WP.94) at its fortieth session (see A/CN.9/527, paras. 24-71), the Working Group agreed that UNCITRAL should attempt to identify the common elements between removing legal barriers to electronic commerce in existing instruments and a possible international convention on electronic contracting, and that both projects should as much as possible be carried out simultaneously[80] (see also A/CN.9/527, para. 30 and A/CN.9/546, para. 34). It was eventually agreed that the Convention should incorporate provisions aimed at removing possible legal obstacles to electronic commerce that might arise under existing international trade-related instruments.[81]

288. One of the objectives of the work of UNCITRAL towards the removal of possible legal obstacles to electronic commerce in existing international instruments was to formulate solutions that obviated the need for amending individual international conventions. Article 20 of the Electronic Communications Convention intends to offer a possible common solution for some of the legal obstacles to electronic commerce under existing international instruments that had been identified by the Secretariat in its above-mentioned survey (see A/CN.9/527, paras. 33-48).

289. The intended effect of the Convention in respect of electronic communications relating to contracts covered by other international conventions is not merely to interpret terms used elsewhere, but to offer substantive rules that allow those other conventions to operate effectively in an electronic environment (see A/CN.9/548, para. 51). However, article 20 is not meant to formally amend any international convention, treaty or agreement, whether or not listed in paragraph 1, or to provide an authentic interpretation of any other international convention, treaty or agreement.

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[80]Ibid., *Fifty-eighth Session, Supplement No. 17* (A/58/17), para. 213.

[81]Ibid., *Fifty-ninth Session, Supplement No. 17* (A/59/17), para. 71.

## *2. Relationship between the Convention and other conventions, treaties or agreements*

290. The combined effect of paragraphs 1 and 2 of article 20 of the Electronic Communications Convention is that, by ratifying the Convention, and except as otherwise declared, a State would automatically undertake to apply the provisions of the Convention to electronic communications exchanged in connection with any of the conventions listed in paragraph 1 or any other convention, treaty or agreement to which a State is or may become a contracting State. These provisions aim at providing a domestic solution for a problem originating in international instruments. They are based on the recognition that domestic courts already interpret international commercial law instruments. Paragraphs 1 and 2 of article 20 of the Electronic Communications Convention ensure that a contracting State would incorporate into its legal system a provision that directs its judicial bodies to use the provisions of the Convention to address legal issues relating to the use of data messages in the context of other international conventions (see A/CN.9/548, para. 49).

291. Article 20 does not list which provisions of the Electronic Communications Convention can or should be applied to electronic communications exchanged in connection with contracts governed by other conventions, treaties and agreements. Such a list, however valuable in theory, would have been extremely difficult to draw up, in view of the diversity of the contractual matters covered by existing conventions. The Electronic Communications Convention therefore leaves it for a body applying the Convention to establish which of its provisions might be relevant in respect of the exchange of electronic communications to which other conventions also apply. It is expected that if any provision in the Electronic Communications Convention is not appropriate for certain transactions, that circumstance should be clear to a reasonable person applying that Convention (see A/CN.9/548, para. 55).

## *3. The list of conventions in paragraph 1*

292. The list in paragraph 1 of article 20 has been included merely for purposes of clarity. Parties to contracts falling under the scope of application of the Electronic Communications Convention to which any of these conventions also apply will therefore know beforehand that the electronic communications exchanged by them will benefit from the favourable regime provided by the Convention.

293. Five of the conventions listed in paragraph 1 resulted from the work of UNCITRAL: the Convention on the Limitation Period in the International Sale of Goods ("Limitation Convention");[82] the United Nations Convention on Contracts for the International Sale of Goods ("United Nations Sales Convention");[83] the United Nations Convention on the Liability of Operators of Transport Terminals in

[82]United Nations, *Treaty Series*, vol. 1511, No. 26119.

[83]Ibid., vol. 1489, No. 25567.

International Trade ("Terminal Operators Convention");[84] the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit ("Guarantees Convention");[85] and the United Nations Convention on the Assignment of Receivables in International Trade ("Receivables Convention").[86] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention")[87] was not prepared by UNCITRAL, but is directly related to its mandate.

294. The fact that two of these conventions have not yet entered into force, namely the Terminal Operators Convention and the Receivables Convention, was not regarded as an obstacle to their inclusion in the list. Indeed, there were several precedents for references in a convention to international instruments that had not yet entered into force at the time the new convention was drafted. One example that had resulted from the work of UNCITRAL was the preparation, at the time of the finalization of the United Nations Sales Convention, in 1980, of a protocol to adapt the Limitation Convention, of 1974, at that time not yet in force, to the regime of the United Nations Sales Convention (see A/CN.9/548, para. 57).

295. Two of the conventions prepared by UNCITRAL were not included in the list: the United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 9 December 1988);[88] and the United Nations Convention on the Carriage of Goods by Sea (Hamburg, 31 March 1978).[89] UNCITRAL considered that the possible problems related to the use of electronic communications under those conventions, as well as under other international conventions dealing with negotiable instruments or transport documents, might require specific treatment and that it might not be appropriate to attempt to address those problems in the context of the Electronic Communications Convention (see A/CN.9/527, para. 29; see also A/CN.9/527, paras. 24-71).

### *4. General effect in respect of electronic communications related to contracts governed by other international conventions, treaties or agreements*

296. The application of the provisions of the Electronic Communications Convention to electronic communications exchanged in connection with contracts covered by other international conventions, treaties or agreements was initially limited to electronic communications in the context of a contract covered by one of the conventions listed in paragraph 1 of article 20. However, it was considered that in many legal systems, the Convention could be applied to the use of electronic communications in the context of contracts covered by any other international

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[84]United Nations publication, Sales No. E.95.V.15.

[85]General Assembly resolution 50/48, annex.

[86]General Assembly resolution 56/81, annex.

[87]United Nations, *Treaty Series*, vol. 330, No. 4739.

[88]General Assembly resolution 43/165, annex.

[89]United Nations, *Treaty Series*, vol. 1695, No. 29215.

convention simply by virtue of article 1, without the need for a specific reference to a convention governing such a contract in article 20.

297. Paragraph 2 of article 20 was therefore adopted with a view to expanding the scope of application of the Electronic Communications Convention and allowing the parties to a contract to which another legal instrument applied to benefit automatically from the enhanced legal certainty for the exchange of electronic communications that the Convention provided. Given the enabling nature of the provisions of the Convention, it was felt that States would be more likely to be inclined to extending its provisions to trade-related instruments than to excluding their application to other instruments. Under paragraph 2, such an expansion operates automatically, without the need for contracting States to submit numerous opt-in declarations to achieve the same result (see A/CN.9/571, para. 25).

298. Accordingly, in addition to those instruments which, for the avoidance of doubt, are listed in paragraph 1 of article 20, the provisions of the Convention also apply, pursuant to paragraph 2 of article 20, to electronic communications exchanged in connection with contracts covered by other international conventions, treaties or agreements, unless such application has been excluded by a contracting State.

299. Paragraph 2 of article 20 does not specify the nature of the other conventions, treaties or agreements in support of which the provisions of the Electronic Communications Convention may be extended, but the reach of the provision is narrowed down by the reference to electronic communications exchanged "in connection with the formation or performance of a contract". While it was generally understood that those other conventions, treaties or agreements primarily comprised other international agreements or conventions on private commercial law matters, it was felt that such a qualification should not be added, as it would unnecessarily restrict the application of paragraph 2. UNCITRAL considered that the Electronic Communications Convention could have value for many States in connection with contractual matters other than those relating strictly to private commercial law (see A/CN.9/548, para. 60).

300. The last sentence of paragraph 2 of article 20 allows a contracting State to exclude the expanded application of the Convention. The possibility has been added to take into account possible concerns of States that may wish to ascertain first whether the provisions contained in the Convention are compatible with their existing international obligations (see A/CN.9/548, para. 61).

### *5. Specific exclusions or inclusions by contracting States*

301. Paragraph 3 of article 20 adds further flexibility by allowing States to add specific conventions to the list of international instruments to which they would apply the provisions of the Electronic Communications Convention—even if the State has submitted a general declaration under paragraph 2.

302. Paragraph 4 of article 20, in turn, has the opposite effect and allows States to exclude certain specific conventions identified in their declarations. Declarations

under paragraph 4 would exclude the application of the Electronic Communications Convention to the use of electronic communications in respect of all contracts to which the specified international convention or conventions apply. This provision does not contemplate the possibility for a contracting State to exclude only certain types or categories of contract covered by another international convention (see A/CN.9/571, para. 56).

303. A declaration under paragraph 3 of article 20 would extend the application of the entire Electronic Communications Convention, as appropriate (see para. 291 above), to electronic communications exchanged in connection with contracts governed by the conventions, treaties or agreements specified in that State's declaration. A contracting State making such a declaration is not allowed to choose which of the provisions of the Convention would be extended, as it was considered that such an approach would create uncertainty as to which provisions of the Convention applied in any given jurisdiction (see A/CN.9/548, para. 64).

*References to preparatory work*

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|---|---|
| UNCITRAL, 38th session (Vienna, 4-15 July 2005) | A/60/17, paras. 131 and 132 |
| Working Group IV, 44th session (Vienna, 11-22 October 2004) | A/CN.9/571, paras. 23-27 and 47-58 |
| Working Group IV, 43rd session (New York, 15-19 March 2004) | A/CN.9/548, paras. 38-70 |

## *Article 21. Procedure and effects of declarations*

### *1. Time and form of declarations*

304. Article 21 of the Electronic Communications Convention defines the manner of making a declaration under the Convention and of its withdrawal, as well as the time at which a declaration or its withdrawal becomes effective.

305. Declarations under article 17, paragraph 4, article 19, paragraphs 1 and 2, and article 20, paragraphs 2, 3 and 4, may be made at any time. Other declarations, such as under article 17, paragraph 2, and article 18, paragraph 1 (but not a later amendment thereof), must be made at the time of signature, ratification, acceptance or approval. Declarations made at the time of signature are subject to confirmation upon ratification, acceptance or approval. In the absence of confirmation such declarations will be without effect.

306. Several international treaties, including uniform law treaties such as the United Nations Sales Convention,[90] generally authorize contracting States to submit declarations only at the time of the deposit of their instrument of ratification,

[90]Except for declarations under article 94, paragraph 1, and article 96 of the United Nations Sales Convention, which can be made at any time.

acceptance, approval or accession. This limitation is generally justified by the interest in simplifying the operation of the treaty, promoting legal certainty and uniform application of the treaty, which may be hampered by excessive flexibility in making, amending and withdrawing declarations. In the particular case of the Electronic Communications Convention, however, it was generally felt that in an area evolving as rapidly as the area of electronic commerce, in which technological developments rapidly change existing patterns of business and trade practices, it was essential to afford States a greater degree of flexibility in the application of the Convention. A rigid system of declarations that required decisions to be made by States prior to the deposit of instruments of ratification, acceptance, approval or accession might either deter States from joining the Convention, or might prompt them to act in an overly cautious manner, thereby leading States to exclude automatically the application of the Convention in various areas that would have otherwise benefited from the favourable framework it provides for electronic communications.

307. According to paragraph 2 of article 21, declarations and confirmations of declarations must be in writing and formally notified to the depositary. This provision also relates to declarations made at the time of accession, to which no reference was made in paragraph 1 of the article since accession presupposes the absence of signature.

## *2. When declarations take effect*

308. Paragraph 3 of article 21 lays down two rules of general application. The first sentence of paragraph 3, which provides that a declaration takes effect simultaneously with the entry into force of the Electronic Communications Convention in respect of the State concerned, contemplates the normal case of a declaration made at the time of signature, ratification, acceptance or accession which will precede the entry into force of the Convention in respect of that State.

309. In accordance with the second sentence of paragraph 3 of article 21, a declaration that is notified to the depositary after the entry into force of the Convention in respect of the State concerned takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary, a rule which has the advantage of giving other contracting States some time to become aware of the change in the law of the State making the declaration. UNCITRAL did not accept a proposal to reduce to three months the time when declarations lodged after the entry into force of the convention should take effect, as it was felt that three months could not be adequate time to allow for adjustment in certain business practices.[91]

310. Paragraph 4 of article 21 constitutes a pendant to paragraph 2 and the second sentence of paragraph 3 in that it permits the withdrawal by a State at any time of a declaration by formal notification in writing addressed to the depositary,

[91] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 17* (A/60/17), para. 140.

such withdrawal taking effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

*References to preparatory work*

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|---|---|
| UNCITRAL, 38th session (Vienna, 4-15 July 2005) | A/60/17, paras. 137-141 |
| Working Group IV, 44th session (Vienna, 11-22 October 2004) | A/CN.9/571, para. 10 |

## *Article 22. Reservations*

### *1. Reservations not authorized*

311. Article 22 of the Electronic Communications Convention excludes the right of contracting States to make reservations to the Convention. The intention of the provision is to prevent States from limiting the application of the Convention by making reservations beyond the declarations specifically provided for in articles 17 to 20.

312. Although it could be argued that an express statement of the rule was not necessary, as it might be considered to be implicit in the Convention, its presence certainly excludes any ambiguity which might otherwise exist in the light of article 19 of the Vienna Convention on the Law of Treaties,[92] which permits the formulation of reservations unless *(a)* the reservation is prohibited by the treaty; *(b)* the treaty provides that only specific reservations, which do not include the reservation in question, may be made; or *(c)* in cases not falling under subparagraphs *(a)* and *(b)*, the reservation is incompatible with the object and purpose of the treaty.

313. The effect of article 22 of the Electronic Communications Convention, therefore, is to bring the Convention squarely within the ambit of article 19, subparagraph *(a)*, of the Vienna Convention on the Law of Treaties. Article 22 of the Electronic Communications Convention excludes any implied right that States might otherwise have under article 19 of the Vienna Convention on the Law of Treaties to make reservations allegedly not "incompatible with the object and purpose of the treaty". Any such purported reservation by a contracting State to the Electronic Communications Convention must therefore be deemed ineffective.

### *2. Distinction between reservations and declarations*

314. As indicated above, article 22 of the Electronic Communications Convention clearly excludes any reservation to the Convention. However, it does not affect the right of States to make any of the declarations authorized by the Convention, which do not have the effect of reservations. While this distinction is not always made in general treaty practice, it has become customary for conventions on private international law and commercial law matters to differentiate between declarations and reservations.

[92]United Nations, *Treaty Series*, vol. 1155, No. 18232.

315. Unlike most multilateral treaties negotiated by the United Nations, which are typically concerned with relations between States and other matters of public international law, conventions on private international law and commercial law matters deal with law that applies to private business transactions and not to State actions, and are typically intended to be incorporated into the domestic legal system. In order to facilitate coordination between existing domestic law and the provisions of an international convention on commercial law or related matters, States are often given the right to make declarations, for example for the purpose of excluding certain matters from the scope of the convention.

316. Recent provisions in UNCITRAL instruments confirm this practice, such as articles 25 and 26 of the Guarantees Convention and articles 35 to 43 (except for article 38) of the Receivables Convention, in the same way as final clauses in private international law instruments prepared by other international organizations, such as articles 54 to 58 of the Unidroit Convention on International Interests in Mobile Equipment (Cape Town, 2001)[93] and articles 21 and 22 of the Convention on the Law Applicable to Certain Rights in respect of Securities held with an Intermediary (The Hague, 2002) concluded by the Hague Conference on Private International Law.[94]

317. This distinction is important because reservations to international treaties typically trigger a formal system of acceptances and objections, for instance as provided in articles 20 and 21 of the Vienna Convention on the Law of Treaties. This result would lead to considerable difficulties in the area of private international law, as it might reduce the ability of States to agree on common rules allowing them to adjust the provisions of an international convention to the particular requirements of their domestic legal system. Therefore, the Electronic Communications Convention follows this growing practice and distinguishes between declarations pertaining to the scope of application, which the Convention admits and does not subject to a system of acceptances and objections by other contracting States, on the one hand, and reservations, on the other hand, which the Convention excludes[95] (see also A/CN.9/571, para. 30).

*References to preparatory work*

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|---|---|
| UNCITRAL, 38th session (Vienna, 4-15 July 2005) | A/60/17, paras. 142 and 143 |
| Working Group IV, 44th session (Vienna, 11-22 October 2004) | A/CN.9/571, para. 10 |

## *Article 23. Entry into force*

### *1. Time of entry into force of the Convention*

318. The basic provisions governing the entry into force of the Electronic Communications Convention are laid down in article 23, paragraph 1. The paragraph

[93]Available at http://www.unidroit.org/english/conventions/mobile-equipment/main.htm.

[94]Available at http://hcch.e-version.nl/index_en.php/act=conventions.text&cid=72.

[95]See *Official Records of the General Assembly, Sixtieth Session, Supplement No. 17* (A/60/17), para. 143.

provides that the Convention will enter into force on "the first day of the month following the expiration of six months after the deposit of the third instrument of ratification, acceptance, approval or accession".

319. Existing UNCITRAL conventions require as few as three and as many as 10 ratifications for entry into force. In choosing a number of three ratifications, UNCITRAL followed the modern trend in commercial law conventions, which promotes their application as early as possible to those States that seek to apply such rules to their commerce.[96] A six-month period from the date of deposit of the third instrument of ratification, acceptance, approval or accession is provided so as to give States that become parties to the Convention sufficient time to notify all the national organizations and individuals concerned that a convention that would affect them would soon enter into force.

### *2. Entry into force for States that adhere to the Convention after it has entered into force*

320. Paragraph 2 of article 23 deals with the entry into force of the Electronic Communications Convention as regards those States that become parties thereto after the time for its entry into force under paragraph 1 has already started. In respect of such States, the Convention will enter into force on the first day of the month following the expiration of six months after the date of the deposit of their instrument of ratification, acceptance, approval or accession. For example, if a State deposits an instrument of ratification five months before the entry into force of the Convention under paragraph 1 of article 23, the Convention will enter into force for that State on the first day of the month following the expiration of one month after the Convention has entered into force.

*References to preparatory work*

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| UNCITRAL, 38th session (Vienna, 4-15 July 2005) | A/60/17, paras. 148-150 |
| Working Group IV, 44th session (Vienna, 11-22 October 2004) | A/CN.9/571, para. 10 |

## *Article 24. Time of application*

321. While article 23 is concerned with the entry into force of the Electronic Communications Convention as regards the international obligations of the contracting States arising under the Convention, article 24 determines the point in time when the Convention commences to apply in respect of the electronic communications governed by it. As expressly indicated in article 24, the Convention only applies prospectively, that is to electronic communications that are made after the date when the Convention entered into force.

[96]Ibid., para. 149.

322. The words "in respect of each Contracting State" are intended to make it clear that the article refers to the time when the Convention enters into force in respect of the contracting State in question, and not when the Convention enters into force generally. This clarification is to avoid the erroneous interpretation that the Convention would have retrospective application in respect of States that adhere to the Convention after it has already entered into force pursuant to article 23, paragraph 1.[97] The words "each Contracting State" are further to be understood as referring to the contracting State whose laws apply to the electronic communication in question.

*References to preparatory work*

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| UNCITRAL, 38th session (Vienna, 4-15 July 2005) | A/60/17, paras. 151-155 |
| Working Group IV, 44th session (Vienna, 11-22 October 2004) | A/CN.9/571, para. 10 |

## *Article 25. Denunciations*

323. Paragraph 1 of article 25 of the Electronic Communications Convention provides that a State may denounce the Convention by a formal notification in writing addressed to the depositary. Denunciation of the Convention will take effect on the first day of the month following the expiration of 12 months after the notification is received by the depositary, unless such notification specifies a longer period for the denunciation to take effect. The period of 12 months mentioned in paragraph 2 of article 25, which is twice the period for entry into force of the Convention under article 23, is intended to give sufficient time to all concerned, both in the denouncing State and in other contracting States, to become aware of the change in the legal regime applicable to electronic communications in that State.

324. Although article 23 requires three contracting States for the Convention to enter into force, nothing is said as to the fate of the Convention should the number of contracting parties subsequently fall below three, for example as a result of denunciations with a view to the acceptance of a new instrument intended to supersede the Convention. It would however seem that the Convention would remain in force since article 55 of the Vienna Convention on the Law of Treaties provides that "unless the treaty otherwise provides, a multilateral treaty does not terminate by reason only of the fact that the number of parties falls below the number necessary for its entry into force."

*References to preparatory work*

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| UNCITRAL, 38th session (Vienna, 4-15 July 2005) | A/60/17, paras. 156 and 157 |
| Working Group IV, 44th session (Vienna, 11-22 October 2004) | A/CN.9/571, para. 10 |

[97]Ibid. para. 153.