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Legal aspects of electronic commerce

Electronic contracting: provisions for a draft convention

Note by the Secretariat

1. The Working Group began its deliberations on electronic contracting at its thirty-ninth session (New York, 11-15 March 2002). The deliberations of the Working Group since that time are summarized in the provisional agenda for its forty-fourth session (A/CN.9/WG.IV/WP.109).

2. The annex to the present note contains the newly revised version of the draft convention, which reflects the deliberations and decisions of the Working Group at its previous sessions.

V.04-54106 (E)

Annex[1]

Draft convention[2] on the use of electronic communications in international contracts

The States Parties to this Convention,[3]

Reaffirming their belief that international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,

Noting that the increased use of electronic communication improves the efficiency of commercial activities, enhances trade connections and allows new access opportunities for previously remote parties and markets, thus playing a fundamental role in promoting trade and economic development, both domestically and internationally,

Considering that problems created by uncertainty as to the legal value of the use of electronic communications in international contracts constitute an obstacle to international trade,

Convinced that the adoption of uniform rules to remove obstacles to the use of electronic communications would enhance legal certainty and commercial predictability for international contracts and may help States gain access to modern trade routes,

Being of the opinion that uniform rules should respect the freedom of parties to choose appropriate media and technologies, taking account of their interchangeability, to the extent that the means chosen by the parties comply with the purpose of the relevant rules of law,

Desiring to provide a common solution for legal obstacles to the use of electronic communications, including obstacles that might result from the operation of existing international trade law instruments, in a manner acceptable to States with different legal, social and economic systems,

Have agreed as follows:

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[1] The numbers in square brackets after the article numbers indicate the corresponding numbers in the previous version of the draft convention (A/CN.9/WG.IV/WP.108, annex).

[2] The form of a convention has been chosen as a working assumption (see A/CN.9/484, para. 124), pending a final decision by the Working Group as to the nature of the instrument.

[3] The provisions of the preamble are new. The first and third paragraphs are based on the first and second paragraphs of the preamble to the United Nations Convention on the Assignment of Receivables in International Trade (New York, 12 December 2001). The fourth paragraph is partly based on the fourth paragraph of the UNCITRAL Model Law on Electronic Commerce. The fifth paragraph reflects a proposal that was made at the Working Group's forty-third session (A/CN.9/548, para. 82).

CHAPTER I. SPHERE OF APPLICATION

Article 1. Scope of application

1. This Convention applies to the use of electronic communications[4] in connection with the [negotiation] [formation][5] or performance of a contract between parties whose places of business are in different States:

(a) When the States are Contracting States;[6]

(b) When the rules of private international law lead to the application of the law of a Contracting State;[7] or

(c) When the parties have agreed that it applies.[8]

2. The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between the parties or from information disclosed by the parties at any time before or at the conclusion of the contract.

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[4] The expression "electronic communications" has been introduced throughout the text to align the terminology used in various provisions (A/CN.548, para. 85) and to avoid the repetition of lengthy phrases such as "communications, declarations, demands, notices or requests, by means of data messages". Definitions of "communications" and "electronic communications" have been added in draft article 4, subparagraphs (a) and (b).

[5] At its forty-third session, the Working Group requested the Secretariat to offer alternative language to the expression "existing or contemplated contract", which was contained in the previous version of the draft article (see A/CN.9/WG.IV/WP.108, annex), to avoid the impression that the draft article referred to contracts already in existence at the time the Convention entered into force (A/CN.9/548, para. 84).

[6] Draft article 18 [X], paragraph 2, allows Contracting States to exclude the application of this paragraph. For transactions subject to the laws of a State that has made such a declaration, the provisions of the draft convention would apply to electronic communications exchanged between parties whose places of business are in different States, even if those States are not both parties to the convention. The Working Group may wish to consider whether or not such a possibility should instead become the general rule for determining the application of the Convention under draft article 1, as was suggested at the Working Group's forty-third session (see A/CN.9/548, para. 86). In such a case, paragraphs 1 (a) and 1 (b) might become redundant. For those States in which such a broader scope of application might create difficulties, draft article 18 [X] might contemplate a reverse exclusion, namely, that a State might declare that it would apply the Convention only if both parties were located in Contracting States.

[7] This paragraph reproduces a rule that is contained in other UNCITRAL instruments. The Working Group has found the provision useful to allow for an expanded geographic scope of application for the draft convention, since it does not require that the States where the parties to the contract were located should both be Contracting States of the Convention. While there had been objections to that rule already at earlier sessions (see A/CN.9/509, para. 38), the Working Group has thus far agreed to retain paragraph 1 (b) (see A/CN.9/528, para. 42 and A/CN.9/548, paras. 91-92). For those States that might have difficulties applying paragraph 1 (b), it would be possible to exclude its application by virtue of a declaration under draft article 18 [X], paragraph 3. Such a declaration would result in the Convention being not applicable if the rules of private international law of a Contracting State would lead to the application of the law of the State having made such a declaration of exclusion.

[8] This possibility is provided, for instance, in article 1, paragraph 2 (e), of the United Nations Convention on the Carriage of Goods by Sea and in article 1, paragraph 2, of the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit. The Working Group may wish to consider whether it should be possible for Contracting States to exclude this provision by a declaration made pursuant to draft article 18 [X].

3. Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.

[Variant A[9]

4. Without prejudice to article 19 [Y], the provisions of this Convention do not apply to electronic communications relating to the [negotiation] [formation] or performance of a contract which is governed by an international convention, treaty or agreement which is not referred to in paragraph 1 of article 19 [Y], or has not been the subject of a declaration made by a Contracting State under paragraph 2 of article 19 [Y].][10]

[Variant B

4. The provisions of this Convention apply further to electronic communications in connection with the [negotiation] [formation] or performance of a contract that is governed by an international convention, treaty or agreement, even if such international convention, treaty or agreement is not specifically referred to in paragraph 1 of article 19 [Y], unless the Contracting State has excluded this provision by way of a declaration made in accordance with paragraph 3 of article 18 [X].][11]

Article 2. Exclusions

1. This Convention does not apply to electronic communications relating to contracts concluded for personal, family or household purposes.[12]

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[9] Both variants A and B are intended to clarify the relationship between draft articles 1 and 19 [Y].

[10] Variant A reflects the understanding that draft articles 1 and 19 [Y] distinguish between three groups of international contracts. The first group comprises international contracts that are not covered by any existing uniform law convention. The second group comprises contracts falling under existing international conventions other than those listed in draft article 19 [Y], paragraph 1, or expressly mentioned by a Contracting State in a declaration made under paragraph 2 of that article. The last group comprises contracts governed by any of the conventions listed in paragraph 1, or mentioned in a declaration made under paragraph 2, of draft article 19 [Y]. The first group of contracts would fall under the scope of application of the draft convention if they meet the conditions of draft article 1. The third group of contracts would also benefit from the provisions of the draft convention in accordance with draft article 19 [Y], paragraphs 1 and 2. However, electronic communications exchanged in connection with contracts belonging to the second group would not be covered by the draft convention (A/CN.9/548, para. 43).

[11] This variant is intended to widen the scope of application of the draft convention by making it clear that its provisions might also apply to the exchange of electronic communications covered by other treaties beyond those specifically listed in draft article 19 [Y], paragraph 1. The variant reflects the view that the list of instruments in draft article 19 [Y], paragraph 1, or any declaration made under paragraph 2 of that article, should be regarded as non-exhaustive clarifications intended to remove doubts as to the application of the draft convention, but not as effective limitations to its reach (see A/CN.9/548, para. 75). If this variant is retained, the Working Group may wish to retain paragraph 4 of draft article 18 [X], which offers the Contracting States the possibility of excluding the application of this provision.

[12] The last version of this paragraph contained, within square brackets, the words “unless the party offering the goods or services, at any time before or at the conclusion of the contract, neither knew nor ought to have known that they were intended for any such use”. The Working Group,

[2. This Convention does not apply to electronic communications that relate to any of the following:[13]

[(a) (i) Transactions on a regulated exchange; (ii) foreign exchange transactions; (iii) inter-bank payment systems, inter-bank payment agreements or clearance and settlement systems relating to securities or other financial assets or instruments; (iv) the transfer of security rights in, sale, loan or holding of or agreement to repurchase securities or other financial assets or instruments held with an intermediary;

[(b) Contracts that create or transfer rights in immovable property, except for rental rights;

[(c) Contracts requiring by law the involvement of courts, public authorities or professions exercising public authority;

[(d) Contracts of suretyship granted by, and on collateral securities furnished by, persons acting for purposes outside their trade, business or profession;

[(e) Contracts governed by family law or by the law of succession;

[(f) Bills of exchange, promissory notes and other negotiable instruments;

[(g) Documents relating to the carriage of goods;

[*Other exclusions that the Working Group may decide to add*.]

Article 3 [4]. Party autonomy

The parties may exclude the application of this Convention or derogate from or vary the effect of any of its provisions [either by an explicit exclusion or impliedly, through contractual terms that vary from its provisions].[14]

CHAPTER II. GENERAL PROVISIONS

Article 4 [5]. Definitions[15]

For the purposes of this Convention:

[(a) "Communication" means any statement, declaration, demand, notice or request, including an offer and the acceptance of an offer, that the parties are

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at its forty-third session, agreed, after extensive debate, to delete those words, since it preferred that the exclusion of consumer transactions should not be conditional upon the actual or presumed knowledge of one of the parties (see A/CN.9/548, paras. 99-105 and 111-114).

[13] Paragraphs 2 (a) to (g) reflect proposals that were made at previous sessions of the Working Group (see A/CN.9/548, paras. 108-109). The wording in paragraph 1 (a) is based on the formulation used for the corresponding exclusions in article 4, paragraph 2, of the United Nations Convention on the Assignment of Receivables in International Trade.

[14] The words in square brackets reflect a proposal that was made at the Working Group's forty-third session (see A/CN.9/548, para. 122).

[15] The definitions contained in subparagraphs (c) to (f) are derived from article 2 of the UNCITRAL Model Law on Electronic Commerce. The definition of "electronic signature", which appeared in the previous version of the draft convention, has been deleted since the term "electronic signature" is no longer used in draft article 9.

required to make or choose to make in connection with the [negotiation] [formation] or performance of a contract;[16]

[(b) "Electronic communication" means any communication that the parties make by means of data messages;][17]

(c) "Data message" means information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI),[18] electronic mail, telegram, telex or telecopy;

(d) "Originator" of an electronic communication means a party by whom, or on whose behalf, the electronic communication has been sent or generated prior to storage, if any, but it does not include a party acting as an intermediary with respect to that electronic communication;[19]

(e) "Addressee" of an electronic communication means a party who is intended by the originator to receive the electronic communication, but does not include a party acting as an intermediary with respect to that electronic communication;

(f) "Information system" means a system for generating, sending, receiving, storing or otherwise processing data messages;[20]

(g) "Automated information system" means a computer program or an electronic or other automated means used to initiate an action or respond to data messages or performances in whole or in part, without review or intervention by a person each time an action is initiated or a response is generated by the system;[21]

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[16] This definition is new. It is intended to simplify the text and avoid the repetition elsewhere in the draft convention of the various purposes for which electronic communications are exchanged ("declaration, demand, notice, request, including offer and acceptance of an offer").

[17] This definition, too, is new. Several domestic enactments of the UNCITRAL Model Law on Electronic Commerce have preferred to use plain words such as "electronic communications" or "electronic records" in lieu of the more technical expression "data messages". The revised draft uses the term "electronic communication" (which is used, for example, in Australia and Ireland), rather than "electronic record" (which is used, for example, in the United States of America), because of the difficulty of finding an adequate equivalent to the latter term in some languages. The definition establishes a link between the purposes for which data messages may be used and the notion of "data messages", which it is important to retain since it encompasses a wide range of techniques beyond purely "electronic" techniques.

[18] The previous versions of the draft convention contained a definition of "electronic data interchange (EDI)", which was based on the corresponding definition in article 2, subparagraph (b) of the UNCITRAL Model Law on Electronic Commerce. The Working Group may wish to consider whether such a definition, which has been deleted from the current text, would be necessary, in view of the fact that the only reference to EDI in the draft convention is in the definition of "data messages".

[19] The wording of this definition is taken from article 2, subparagraph (c), of the UNCITRAL Model Law on Electronic Commerce. The words "purports to have been sent", which appeared in earlier versions of the draft convention, have been replaced with the words "has been sent".

[20] The Working Group may wish to consider whether this definition needs further clarification, in view of the questions that have been raised in connection with paragraph 2 of the former article 11 (currently article 10) (see A/CN.9/528, paras. 148 and 149, and A/CN.9/546, paras. 59-80).

[21] This definition is based on the definition of "electronic agent" contained in section 2, paragraph 6, of the Uniform Electronic Transactions Act of the United States of America; a similar definition is also used in section 19 of the Uniform Electronic Commerce Act of Canada.

[(h) "Place of business"[22] means [any place of operations where a party carries out a non-transitory activity with human means and goods or services;][23] [the place where a party maintains a stable establishment to pursue an economic activity other than the temporary provision of goods or services out of a specific location;][24]]

[(i) "Person" means natural persons only, whereas "party" includes both natural persons and legal entities;][25]

[*Other definitions that the Working Group may wish to add.*]

Article 5 [6]. Interpretation

1. In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

2. Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable [by virtue of the rules of private international law].[26]

This definition was included in view of the contents of draft article 14.

[22] The proposed definition appears within square brackets since the Commission has not thus far defined "place of business" (see A/CN.9/527, paras. 120-122). At the thirty-ninth session of the Working Group, it was suggested that the rules on the location of the parties should be expanded to include elements such as the place of an entity's organization or incorporation (see A/CN.9/509, para. 53). The Working Group decided that it could consider the desirability of using supplementary elements to the criteria used to define the location of the parties by expanding the definition of place of business (see A/CN.9/509, para. 54). The Working Group may wish to consider whether the proposed additional notions and any other new elements should be provided as an alternative to the elements currently used or only as a default rule for those entities without an "establishment". Additional cases that might deserve consideration by the Working Group might include situations where the most significant component of human means or goods or services used for a particular business are located in a place bearing little relationship to the actual centre of a company's affairs, such as when the only equipment and personnel used by a so-called "virtual business" located in one country consists of leased space in a third-party server located elsewhere.

[23] This alternative 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.

[24] This alternative follows the understanding of the concept of "place of business" in the European Union (see para. 19 of the preamble to Directive 2000/31/EC of the European Union).

[25] This definition has been amended so as to clarify the meaning of these terms, which are not synonymous, for instance, in the context of draft article 14.

[26] The closing phrase has been placed in square brackets at the request of the Working Group. Similar formulations in other instruments had been incorrectly understood as allowing immediate referral to the applicable law pursuant to the rules on conflict of laws of the forum State for the interpretation of a convention without regard to the conflict of laws rules contained in the Convention itself (see A/CN.9/527, paras. 125 and 126).

Article 6 [7]. Location of the parties

1. For the purposes of this Convention, a party's place of business is presumed to be the location indicated by that party [, unless the party does not have a place of business at such location [[and] such indication is made solely to trigger or avoid the application of this Convention]].[27]

2. If a party [has not indicated a place of business or][28] has more than one place of business, then, subject to paragraph 1 of this article, the place of business for the purposes of this Convention is that which has the closest relationship to the relevant contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract.

3. If a party does not have a place of business, reference is to be made to the person's habitual residence.

4. The place of location of the equipment and technology supporting an information system used by a party in connection with the formation of a contract or the place from which the information system may be accessed by other parties, in and of themselves, do not constitute a place of business [, unless such party is a legal entity that does not have a place of business [within the meaning of article 4 (h)]].[29]

5. The sole fact that a party makes use of a domain name or electronic mail address connected to a specific country does not create a presumption that its place of business is located in that country.[30]

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[27] The draft paragraph is not intended to create a new concept of "place of business" for the online world. The phrase in square brackets aims to prevent a party from benefiting from recklessly inaccurate or untruthful representations (see A/CN.9/509, para. 49), but not to limit the parties' ability to choose the Convention or otherwise agree on the applicable law. The two variants previously contained in the draft paragraph have been combined (see A/CN.9/528, paras. 87-91). The words "manifest and clear" which the Working Group found to be conducive to legal uncertainty (see A/CN.9/528, para. 86), have been deleted.

[28] It has been suggested to the Secretariat that the presumption contemplated in the draft article could also apply in the event that a party does not indicate its place of business. This suggestion has been inserted in square brackets, since the presumption contemplated in the draft article has been used in other UNCITRAL instruments only in connection with multiple places of business.

[29] The draft paragraph reflects the principle that rules on location should not 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). The draft paragraph follows the solution proposed in paragraph 19 of the preamble to Directive 2000/31/EC of the European Union (see also the overview of issues related to the location of information systems in A/CN.9/WG.IV/WP.104, paras. 9-17). The phrase within square brackets is only intended to deal with so-called "virtual companies" and not with natural persons, who are covered by the rule contained in draft paragraph 3. Should the Working Group discard the possibility contemplated in the phrase in square brackets and prefer instead to make it clear that the location of the equipment and technology supporting an information system is never a relevant criterion, the Working Group may wish to rephrase the draft paragraph to read along the following lines: "A location is not a place of business merely because that is where: (a) equipment and technology supporting an information system used by a person in connection with the formation of a contract is located; or (b) such information system may be accessed by other persons."

[30] Since the current system for assignment of domain names was not originally conceived in

Article 7 [7 bis]. Information requirements

Nothing in this Convention affects the application of any rule of law that may require the parties to disclose their identities, places of business or other information, or relieves a party from the legal consequences of making inaccurate or false statements in that regard.

CHAPTER III. USE OF ELECTRONIC COMMUNICATIONS IN INTERNATIONAL CONTRACTS

Article 8. Legal recognition of electronic communications

1. A contract or other communication shall not be denied validity or enforceability on the sole ground that it is in the form of an electronic communication.

[2. Nothing in this Convention requires a party to use or accept electronic communications, but a party's agreement to do so may be inferred from the party's conduct.][31]

Article 9. Form requirements

[1. Nothing in this Convention requires a contract or any other communication to be made or evidenced in any particular form.][32]

2. Where the law requires that a contract or any other communication should be in writing, or provides consequences for the absence of a writing, that requirement is met by an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference.[33]

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geographical terms, the Working Group held that the apparent connection between a domain name and a country was insufficient to support a presumption that there was a genuine and permanent link between the domain name user and the country (see A/CN.9/509, paras. 44-46; see also A/CN.9/WG.IV/WP.104, paras. 18-20). However, in some countries the assignment of domain names is 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 relates. For those countries, it might be appropriate to rely, at least in part, on domain names for the purpose of article 7, contrary to what is suggested in the draft paragraph (see A/CN.9/509, para. 58). The Working Group may wish to consider whether the proposed rules should be expanded to deal with those situations.

[31] The provision reflects the idea that parties should not be forced to accept contractual offers or acts of acceptance by electronic means if they do not want to do so (see A/CN.9/527, para. 108). However, since the provision is not intended to require that the parties should always agree beforehand on the use of data messages, the second phrase provides that a party's agreement to transact electronically may be inferred from its conduct. The reference to "consent" has been replaced with the phrase "a person's agreement to use or accept information in the form of data messages" so as to avoid the erroneous impression that the draft paragraph refers to consent to the underlying transaction (see A/CN.9/546, para. 43).

[32] This provision incorporates the general principle of freedom of form contained in article 11 of the United Nations Sales Convention, in the manner suggested at the forty-second session of the Working Group (see A/CN.9/546, para. 49).

[33] This provision sets forth the criteria for the functional equivalence between data messages and paper documents, in the same manner as article 6 of the UNCITRAL Model Law on Electronic Commerce. The Working Group may wish to consider the meaning of the words "the law" and "writing" and whether there would be a need for including definitions of those terms (see A/CN.9/509, paras. 116 and 117).

3. Where the law requires that a contract or any other communication should be signed by a party, or provides consequences for the absence of a signature, that requirement is met in relation to an electronic communication if:

(a) A method is used to identify the party and to indicate that party's approval of the information contained in the electronic communication; and

(b) That method is as reliable as appropriate to the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement.[34]

[4. Where the law requires that a contract or any other communication should be presented or retained in its original form,[35] or provides consequences for the absence of an original, that requirement is met in relation to an electronic communication if:

[(a) There exists a reliable assurance as to the integrity of the information it contains from the time when it was first generated in its final form, as an electronic communication or otherwise; and

[(b) Where it is required that the information it contains be presented, that information is capable of being displayed to the person to whom it is to be presented.

[5. For the purposes of paragraph 4 (a):

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

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

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[34] The draft paragraph recites the general criteria for the functional equivalence between hand-written signatures and electronic identification methods referred to in article 7 of the UNCITRAL Model Law on Electronic Commerce.

[35] Earlier versions of the draft convention did not contain provisions dealing with electronic equivalents of "original" paper-based documents. The reason for the absence of such a provision was that the draft convention was essentially concerned with matters of contract formation, and not with rules of evidence. A provision on "originals" might however become necessary if draft article 19 [Y] were to make the provisions of the draft convention applicable to arbitration agreements governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the 1958 New York Convention"). This matter will be submitted to the consideration of Working Group II (Arbitration) at its forty-second session (Vienna, 13-17 September 2004). The Secretariat will inform Working Group IV (Electronic Commerce) of the recommendations made by Working Group II (Arbitration) on this matter (see also footnote 55).

Article 10. Time and place of dispatch and receipt of electronic communications[36]

1. The time of dispatch of an electronic communication is the time when the electronic communication [enters an information system outside the control of the originator or of the party who sent the data message on behalf of the originator] [leaves an information system under the control of the originator or of the party who sent the data message on behalf of the originator],[37] or, if the electronic communication message has not [entered an information system outside the control of the originator or of the party who sent the data message on behalf of the originator] [left an information system under the control of the originator or of the party who sent the data message on behalf of the originator], at the time when the electronic communication is received.

2. The time of receipt of an electronic communication is the time when the electronic communication becomes capable of being retrieved by the addressee or by any other party named by the addressee. An electronic communication is presumed to be capable of being retrieved by the addressee when the electronic communication enters an information system of the addressee unless it was unreasonable for the originator to have chosen that information system for sending the electronic communication, having regard to the content of the electronic communication and the circumstances of the case [, including any designation by the addressee of a particular information system for the purpose of receiving electronic communications.]

3. An electronic communication is deemed to be dispatched at the place where the originator has its place of business and is deemed to be received at the place where the addressee has its place of business, as determined in accordance with article 7.

4. Paragraph 2 of this article applies notwithstanding that the place where the information system is located may be different from the place where the electronic communication is deemed to be received under paragraph 3 of this article.

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[36] Earlier versions of the draft article followed more closely the formulation of article 15 of the UNCITRAL Model Law on Electronic Commerce, with some adjustments to harmonize the style of the individual provisions with the style used elsewhere in the draft convention. The current formulation reflects the deliberations of the Working Group at its forty-second session (see A/CN.9/546, paras. 59-86). The Working Group may wish to review the new formulation, in particular draft paragraph 2, with a view to ensuring that it is consistent in result with article 15 of the Model Law.

[37] The Working Group may wish to consider whether the rule in the first set of square brackets is indeed appropriate in view of the fact that the originator is more likely to have a record of when a data message leaves an information system than to have a record of when the message enters some intermediate information system. The phrase in the second set of square brackets takes that factual situation into account.

Article 11. Invitations to make offers[38]

A proposal to conclude a contract made through one or more electronic communications which is not addressed to one or more specific parties, but is generally accessible to parties making use of information systems, including proposals that make use of interactive applications[39] for the placement of orders through such information systems, is to be considered as an invitation to make offers, unless it clearly indicates the intention of the party making the proposal to be bound in case of acceptance.

Article 12. Use of automated information systems for contract formation[40]

A contract formed by the interaction of an automated information system and a person, or by the interaction of automated information systems, shall not be denied validity or enforceability on the sole ground that no person reviewed each of the individual actions carried out by the systems or the resulting contract.

[*Article 13. Availability of contract terms*

[Variant A[41]

Nothing in this Convention affects the application of any rule of law that may require a party that negotiates some or all of the terms of a contract through the exchange of electronic communications to make available to the

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[38] This provision deals with an issue that has given rise to extensive debate. At the forty-first session of the Working Group, it was noted that "there was currently no standard business practice in that area" (see A/CN.9/528, para. 117). The current text is inspired by article 14, paragraph 1, of the United Nations Sales Convention and affirms the principle that proposals to conclude a contract that are addressed to an unlimited number of persons are not binding offers, even if they involve the use of interactive applications. The Working Group may wish to consider, however, whether specific rules should be formulated to deal with offers of goods through Internet auctions and similar transactions, which in many legal systems have been regarded as binding offers to sell the goods to the highest bidder.

[39] At its forty-second session, the Working Group noted that the expression "automated information system", which had been used in earlier versions of the draft article, did not offer meaningful guidance since the party that placed an order might have no means of knowing how the order would be processed and to what extent the information system was automated. The notion of "interactive applications", in turn, was considered to be an objective term that better described a situation apparent to any person accessing the system, namely, that it was prompted to exchange information through that system by means of immediate actions and responses having an appearance of automaticity. It was noted that the term was not a legal term but rather a term of art highlighting that the provision focused on what was apparent to the party activating the system rather than on how the system functioned internally. On that basis, the Working Group agreed that the term "interactive applications" could be retained (see A/CN.9/546, para. 114).

[40] This article has been redrafted as a non-discrimination rule, as requested by the Working Group at its forty-second session (see A/CN.9/546, paras. 128 and 129). At that time, it was suggested that the Working Group might wish to consider adding a general provision on attribution of data messages, including attribution of data messages exchanged by automated information systems (see A/CN.9/546, paras. 85, 86 and 125-127).

[41] This variant has been added pursuant to a request by the Working Group in view of the controversy around the draft article (see A/CN.9/546, paras. 130-135). If this variant alone is retained, the Working Group may wish to consider placing the draft article in chapter I or II of the draft convention.

other contracting party those electronic communications that contain the contractual terms in a particular manner, or relieves a party from the legal consequences of its failure to do so.]

[Variant B[42]

A party offering goods or services through an information system that is generally accessible to persons making use of information systems[43] shall make the electronic communication or communications which contain the contract terms[44] available to the other party [for a reasonable period of time] in a way that allows for its or their storage and reproduction.]

[*Article 14. Error in electronic communications*[45]

[1. Where a person makes an error in an electronic communication exchanged with the automated information system of another party and the automated information system does not provide the person with an opportunity to correct the error, that person, or the party on whose behalf that person was acting, has the right to withdraw the electronic communication in which the error was made if:

[(a) The person, or the party on whose behalf that person was acting, notifies the other party of the error as soon as practicable after having learned of the error and indicates that he or she made an error in the electronic communication;

[(b) The person, or the party on whose behalf that person was acting, takes reasonable steps, including steps that conform to the other party's instructions, to

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[42] This variant, which is based on article 10, paragraph 3, of Directive 2000/31/EC of the European Union, appears in square brackets, as there was no consensus on the need for the provision within the Working Group (see A/CN.9/509, paras. 123-125, and A/CN.9/546, paras. 130-135). If the provision is retained, the Working Group may wish to consider whether the draft article should provide consequences for the failure by a party to make available the contract terms and what consequences would be appropriate. In some legal systems the consequences might be that a contractual term that has not been made available to the other party cannot be enforced against it.

[43] The Working Group may wish to consider whether these words adequately describe the types of situations that the Working Group intends to address in the draft article.

[44] The words "and general conditions" have been deleted as they appeared to be redundant. The Working Group may, however, wish to consider whether the provision should be made more explicit as to the version of the contract terms that needs to be retained.

[45] This draft paragraph deals with the issue of errors in automated transactions (see A/CN.9/WG.IV/WP.95, paras. 74-79). Earlier versions of the draft article contained, in paragraph 1 of variant A, a rule based on article 11, paragraph 2, of Directive 2000/31/EC of the European Union, which creates an obligation for persons offering goods or services through automated information systems to offer means for correcting input errors, and required such means to be "appropriate, effective and accessible". The draft article was the subject of essentially two types of objections: one objection was that the draft convention should not deal with a complex substantive issue such as error and mistake, a matter on which the Working Group has not yet reached a final decision; another objection was that the obligations contemplated in article 14, paragraph 2, of the first version of the draft convention (as contained in A/CN.9/WG.IV/WP.95) were regarded as being of a regulatory or public law nature (see A/CN.9/509, para. 108). The Working Group may wish to consider whether the latter objection could be addressed by deleting the reference to an obligation to provide means for correcting errors and by contemplating only private law consequences for the absence of such means.

return the goods or services received, if any, as a result of the error or, if instructed to do so, to destroy the goods or services; and

[(c) The person, or the party on whose behalf that person was acting, has not used or received any material benefit or value from the goods or services, if any, received from the other party.][46]

[2. Nothing in this article affects the application of any rule of law that may govern the consequences of any errors made during the [negotiation] [formation] or performance of the type of contract in question other than an error that occurs in the circumstances referred to in paragraph 1.]

[*Other substantive provisions that the Working Group may wish to include.*][47]

CHAPTER IV. FINAL PROVISIONS[48]

Article 15. Depositary

The Secretary-General of the United Nations is hereby designated as the depositary for this Convention.

Article 16. Signature, ratification, acceptance or approval

1. This Convention is open for signature by all States [at […] from […] to […] and thereafter] at the United Nations Headquarters in New York from […] to […].

2. This Convention is subject to ratification, acceptance or approval by the signatory States.

3. This Convention is open for accession by all States which are not signatory States as from the date it is open for signature.

4. Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

Article 17. Effect in domestic territorial units

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[46] Paragraphs 1 (b) and 1 (c) appear within square brackets since it was suggested, at the thirty-ninth session of the Working Group, that the matters dealt with therein went beyond matters of contract formation and departed from the consequences of avoidance of contracts under some legal systems. However, the prevailing view was that a provision offering a harmonized solution for dealing with the consequences of errors in electronic commerce transactions had great practical importance and was needed in the draft convention (see A/CN.9/509, para. 110).

[47] Such additional provisions might include the consequences for a person's failure to comply with draft articles 11, 15 and 16, an issue that the Working Group has not yet considered (see A/CN.9/527, para. 103), and other issues that the Working Group may wish to include.

[48] Except for draft articles 18 [X] and 19 [Y], all provisions in this chapter are new. They are based on corresponding provisions in other international conventions prepared by UNCITRAL and follow the advice and practice set out in the Handbook *Final Clauses of Multilateral Treaties* (United Nations publication, Sales No. E.04.V.3), prepared in 2003 by the Treaty Section of the United Nations Office of Legal Affairs (also available to subscribers of the United Nations Treaty Collection databases at http://untreaty.un.org/English/FinalClauses/Handbook.pdf).

1. If a Contracting State has two or more territorial units in which, according to its constitution, different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

2. These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

3. If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, and if the place of business of a party is located in that State, this place of business, for the purposes of this Convention, is considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends.

4. If a Contracting State makes no declaration under paragraph (1) of this article, the Convention is to extend to all territorial units of that State.

Article 18 [X]. Reservations and declarations[49]

1. No reservations are permitted except those expressly authorized in this article.

2. Any State may declare in writing at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by paragraph 1 (a) of article 1 of this Convention.[50]

3. Any State may declare in writing at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by paragraph 1 (b) of article 1 of this Convention.[51]

4. Any State may declare in writing at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by paragraph 4 of article 1 of this Convention.[52]

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[49] The Working Group has not yet concluded its deliberations on possible exclusions to the preliminary draft convention under draft article 2 (see A/CN.9/527, paras. 83-98). The draft article has been added as a possible alternative, in the event that consensus is not achieved on possible exclusions to the preliminary draft convention.

[50] The intended effect of such a declaration would be that for transactions subject to the laws of the relevant State, the provisions of the draft convention would apply to exchanges of data messages in connection with the formation or performance of contracts between parties whose places of business are in different States, even if only one of those States is a party to the Convention.

[51] At its forty-first session, the Working Group agreed to consider, at a later stage, a provision allowing Contracting States to exclude the application of paragraph 1 (b) of article 1, along the lines of article 95 of the United Nations Sales Convention (see A/CN.9/528, para. 42).

[52] This provision has been included to reflect a proposal made at the forty-third session of the Working Group (see A/CN.9/548, para. 78). It is logically related to variant B of draft article 1, paragraph 4, and would become superfluous if the Working Group were to retain variant A of draft article 1, paragraph 4.

[5. Any State may declare in writing at any time[53] that it will not apply this Convention to the matters specified in its declaration.][54]

6. A State making a reservation in writing under paragraphs 2, 3 and 4 of this article shall not be bound by the matters specified in such reservation.

Article 19 [Y]. Communications exchanged under other international conventions[55]

1. Except as otherwise stated in a declaration made in accordance with paragraph 3 of this article, [each Contracting State declares[56] that it shall apply the provisions of this Convention] [the provisions of this Convention[57] shall apply] to the use of electronic communications in connection with the [negotiation] [formation] or performance of a contract [or agreement][58] to which any of the following international conventions, to which the State is or may become a Contracting State, apply:

[Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958)][59]

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[53] At its forty-third session, the Working Group agreed to use the words "at any time" in this paragraph (see A/CN.9/548, paras. 32-33). The Working Group may wish to consider whether it would be appropriate to use the same formulation in paragraphs 2, 3 and 4 of this draft article.

[54] This provision appears in square brackets, pending a decision by the Working Group as to whether the possibility of unilateral exclusions should be retained even if the Working Group were to agree on a common list of exclusions under draft article 2.

[55] The draft article is intended to offer a possible common solution for some of the legal obstacles to electronic commerce under existing international instruments, which had been the object of a survey contained in an earlier note by the Secretariat (see A/CN.9/WG.IV/WP.94). At the fortieth session of the Working Group, there was general agreement to proceed in that manner, to the extent that the issues were common, which was the case at least with regard to most issues raised under the instruments listed in paragraph 1 (see A/CN.9/527, paras. 33-48). This article is intended to remove doubts as to the relationship between the rules contained in the draft convention and rules contained in other international conventions. It is not the purpose of the draft article to amend any other international convention. In practice, the draft article would have the effect of an undertaking by each of the Contracting States to use the provisions of the draft convention to remove possible legal obstacles to electronic commerce that might arise from the interpretation of those conventions and to facilitate their application in cases where the parties conduct their transactions through electronic means.

[56] The obligation assumed by each Contracting State under this article is intended to be automatically effective upon ratification, acceptance, approval or accession and does not require a separate declaration by the Contracting State (see A/CN.9/548, para. 52).

[57] The last version of the draft article specifically referred to draft article 6 [7] and to the substantive provisions of the draft convention contained in chapter III. That cross reference was intended to avoid the impression that the provisions on the scope of application of the draft convention would affect the definition of the scope of application of other international conventions. The cross references have been deleted since the Working Group, at its forty-third session, felt that the cross reference was not necessary (A/CN.9/548, paras. 53-54).

[58] The words "or agreement" have been included in square brackets in the event that the Working Group decides to include the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the 1958 New York Convention") in the list in paragraph 1, since the 1958 New York Convention uses the expression "arbitration agreement".

[59] It has been suggested to the Secretariat that the use of electronic communications to conclude international arbitration agreements might benefit from a provision that expressly recognizes their validity for the purposes of the 1958 New York Convention. Reference to this Convention appears within square brackets, however, because neither Working Group II (Arbitration) nor

Convention on the Limitation Period in the International Sale of Goods (New York, 14 June 1974) and Protocol thereto (Vienna, 11 April 1980)

United Nations Convention on Contracts for the International Sale of Goods (Vienna, 11 April 1980)

United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 19 April 1991)[60]

United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 11 December 1995)

United Nations Convention on the Assignment of Receivables in International Trade (New York, 12 December 2001).

2. Any State may declare in writing at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will also apply this Convention to the exchange by means of data messages of any communications, declarations, demands, notices or requests under any other international agreement or convention [on commercial law matters][pertaining to international trade] to which the State is a Contracting State [and which are identified in that State's declaration].[61]

3. Any State may declare in writing at any time that it will not apply this Convention[62] to international contracts falling within the scope of [any of the conventions referred to in paragraph 1 of this article][any international agreements, treaties or conventions, including any of the conventions referred to in paragraph 1

Working Group IV (Electronic Commerce) have yet had an opportunity to consider this matter. If the reference is maintained, it may be necessary to include a provision on electronic equivalents of "original" documents, since article IV, paragraph (1) (b) of the 1958 New York Convention requires that the party seeking recognition and enforcement of a foreign arbitral award must submit, inter alia, an original or a duly authenticated copy of the arbitration agreement (see also new paras. 4 and 5 of draft article 9 and footnote 35 above).

[60] Neither this Convention nor the Convention on the Assignment of Receivables in International Trade has yet entered into force. Reference in a subsequent international convention to an earlier instrument not yet in force, or subsequent provisions to adjust or interpret the text of an earlier instrument not yet in force, are not contrary to international treaty practice and have been used in the past. For example, at the time of the adoption of the United Nations Convention on Contracts for the International Sale of Goods ("the United Nations Sales Convention"), in 1980, the 1974 Convention on the Limitation Period in the International Sale of Goods ("the Limitations Convention") had not yet entered into force. Nevertheless, the diplomatic conference that adopted the United Nations Sales Convention also adopted a Protocol amending the Limitations Convention. Both the Limitations Convention (in its original form) and the 1980 Protocol (for those Contracting States that had ratified the United Nations Sales Convention) entered into force on 1 August 1988.

[61] Paragraph 1 is intended to make it clear that the provisions of the draft convention apply also to messages exchanged under any of the international conventions referred to therein. Paragraph 2 contemplates the possibility for a Contracting State to extend the application of the new instrument to the use of data messages in the context of other international conventions.

[62] The words "or any specific provision thereof", which were contained in the last version of the draft paragraph have been deleted, since the Working Group was of the view that a State choosing to adopt the draft convention should not be permitted to apply only some but not all of its provisions (A/CN/9/548, para. 63).

of this article, to which the State is a Contracting Party and which are identified in that State's declaration].[63]

Article 20. Procedure and effects of reservations and declarations

1. Reservations and declarations made under this Convention at the time of signature are subject to confirmation upon ratification, acceptance or approval.

2. Reservations and declarations and their confirmations are to be in writing and be formally notified to the depositary.

3. A reservation or declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a reservation or declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary.

4. Any State which makes a reservation or declaration under this Convention may withdraw it at any time by a formal notification in writing addressed to the depositary. The withdrawal is to take 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.

Article 21. Amendments

1. Any Contracting State may propose amendments to this Convention. Proposed amendments shall be submitted in writing to the Secretary-General of the United Nations, who shall circulate the proposal to all States Parties, with the request that they indicate whether they favour a conference of States Parties. In the event that, within four months from the date of such communication, at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Proposals for amendment shall be circulated to the Contracting States at least ninety days in advance of the conference.

2. Amendments to this Convention shall be adopted by [two thirds] [a majority of] the Contracting States present and voting at the conference of Contracting States and shall enter into force for all Contracting States on the first day of the month following the expiration of six months after the date on which [two thirds] of the Contracting States as of the time of the adoption of the amendment at the conference of the Contracting States have deposited their instruments of acceptance of the amendment.

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[63] The second set of words in square brackets has been included pursuant to suggestions made at the Working Group's forty-third session (A/CN/9/548, para. 67). They give the Contracting States the possibility to limit the scope of application of the draft convention. This possibility presupposes that the provisions of the draft convention might apply to electronic communications relating to contracts governed by other international conventions not listed in paragraph 1 of the draft article, a possibility which is contemplated in paragraph 4, variant B, of draft article 1. This option might become superfluous if the Working Group were to retain variant A of draft article 1, paragraph 4.

Article 22. Entry into force

1. This Convention enters into force on the first day of the month following the expiration of six months after the date of deposit of the [...] instrument of ratification, acceptance, approval or accession.

2. When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the […] instrument of ratification, acceptance, approval or accession, this Convention enters into force in respect of that State on the first day of the month following the expiration of six months after the date of the deposit of its instrument of ratification, acceptance, approval or accession.

Article 23 Transitional rules

This Convention applies only to electronic communications that are exchanged after the date when the Convention enters into force in respect of the Contracting States referred to in paragraph 1 (a) or the Contracting State referred to in paragraph 1 (b) of article 1.

Article 24. Denunciations

1. A Contracting State may denounce this Convention by a formal notification in writing addressed to the depositary.

2. The denunciation takes effect on the first day of the month following the expiration of twelve months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

DONE at […], this […] day of […], […], in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed this Convention.