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Draft convention on the use of electronic communications in international contracts

Note by the Secretariat

Addendum: Background information

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I. Introduction

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 paragraphs 3 to 32 below. Having completed its work at its forty-fourth session (Vienna, 11-22 October 2004), the Working Group requested the Secretariat to circulate the revised version of the draft convention to Governments for their comments, with a view to consideration and adoption of the draft convention by the Commission at its thirty-eighth session, in 2005.

2. The annex to document A/CN.9/577 contains the newly revised version of the draft convention, which includes the articles adopted by the Working Group at its forty-fourth session, as well as the draft preamble and final provisions on which the Working Group only held a general exchange of views at that time (see para. 27). This addendum contains a summary of the relevant deliberations of the Working Group and the Commission (paras. 3-27) as well as short notes intended to facilitate the consideration of the draft convention by Governments, in particular those that have not actively participated in the deliberations of the Working Group, and by the Commission (paras. 28-65).

II. Summary of deliberations by the Working Group

3. At its thirty-third session (New York, 17 June-7 July 2000), the United Nations Commission on International Trade Law (UNCITRAL, hereafter referred to as "the Commission") 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 on Contracts for the International Sale of Goods (the "United Nations Sales Convention");[1] online dispute settlement, and dematerialization of documents of title, in particular in the transport industry.

4. The Commission welcomed those suggestions. The Commission generally agreed that, upon completing the preparation of the Model Law on Electronic Signatures, the Working Group 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.[2]

5. 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, in particular, rights in tangible goods, by electronic means 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, as well as the UNCITRAL Arbitration Rules, to assess their appropriateness for meeting the specific needs of online arbitration (A/CN.9/484, para. 134).

6. 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 by the Working Group could involve consideration of several topics in parallel.[3] 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.[4]

7. 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” (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).

8. The Working Group considered first the form and scope of the preliminary draft convention (see A/CN.9/509, paras. 18-40). The Working Group agreed to postpone discussion on exclusions from the draft 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 (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 8-13 (A/CN.9/509, paras. 66-121). The Working Group concluded its deliberations on the draft 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 draft 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 draft convention, based on those deliberations and decisions, for consideration by the Working Group at its fortieth session.

9. 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 communications 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 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).

10. 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.[5]

11. 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).[6]

12. 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 analysis and endorsed the recommendations that had been made by the Secretariat (see A/CN.9/527, paras. 24-71). The Working Group agreed to recommend that the 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 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 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 draft convention (see A/CN.9/527, paras. 72-126).

13. The Working Group resumed its deliberations on the preliminary draft 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 draft 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 draft convention are reflected in chapter IV of the report on its forty-first session (see A/CN.9/528, paras. 26-151).

14. 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 draft 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 draft 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 an exclusion was necessary would ultimately depend on the substantive scope of the draft convention.

15. At its thirty-sixth session (Vienna, 30 June-11 July 2003), the Commission noted the progress made by the 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 Secretariat in that respect. The Commission noted that the Working Group had recommended that the 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 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.[7]

16. The Commission further noted with appreciation that the Working Group had continued its consideration of a preliminary draft 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.[8]

17. The Commission was informed that the Working Group had exchanged views on the relationship between the preliminary draft 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.[9]

18. 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 draft 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 draft 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.[10]

19. 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 draft convention. The Working Group, inter alia, noted that a task force had been established by the International Chamber of Commerce to develop contractual 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 draft 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).

20. The Working Group proceeded to review articles 8 to 15 of the revised preliminary draft convention contained in the annex to the 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).

21. The Working Group continued its work on the preliminary draft 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 draft convention (A/CN.9/WG.IV/WP.108). The deliberations of the Working Group focused on draft articles X, Y and 1 to 4 (A/CN.9/548, paras. 13-123). The Working Group agreed that it should endeavour to complete its work on the draft convention with a view to enabling its review and approval by the Commission in 2005.

22. 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 draft 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 draft 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 draft 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 draft 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 draft convention should be treated as a matter of importance, which would justify approving a two-week forty-fourth session of the Working Group to be held in October 2004.[11]

23. The Working Group resumed its deliberations at its forty-fourth session (Vienna, 11-22 October 2004), on the basis of a newly revised preliminary draft convention contained in annex I of the 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 draft 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 draft 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 draft 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 draft convention to Governments for their comments, with a view to consideration and adoption of the draft convention by the Commission at its thirty-eighth session, in 2005.

III. Notes on the main provisions of the draft convention

24. The purpose of the draft convention is to offer practical solutions for issues related to the use of electronic means of communication in connection with international contracts.

25. The draft convention is not intended to establish uniform rules for substantive contractual issues that are not specifically related to the use of electronic communications. However, given that a strict separation between technology-related and substantive issues in the context of electronic commerce is not always feasible or desirable, the draft 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 (A/CN.9/527, para. 81).

A. Sphere of application (draft articles 1 and 2)

26. The draft 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".

1. Territorial sphere of application

27. It was the intention of the Working Group that the draft convention should not be 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 (A/CN.9/509, para. 35).

28. Unlike other international instruments, such as the United Nations Sales Convention, the draft convention does not require that both parties be located in Contracting States.

29. 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 the convention applies 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. (A/CN.9/548, para. 88).

30. The Working Group had initially contemplated a rule similar to paragraph 1 (a) of article 1 of the United Nations Sales Convention to ensure consistency between the two texts (A/CN.9/509). However, as the Working Group's deliberations progressed and the impact of the draft convention became clearer, the need for parallelism between the draft 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 (A/CN.9/548, para. 89).

31. It was further argued that a rule similar to paragraph 1 (a) of article 1 of the United Nations Sales Convention would automatically prevent the application of the draft convention whenever one of the States involved was not a Contracting State. It was further felt that, to the extent that several provisions of the draft convention were intended to support or facilitate the operation of other laws in an electronic environment (such as, for example, draft articles 8 and 9), a requirement similar to paragraph 1 (a) of article 1 of the United Nations Sales Convention would lead to the undesirable result that a domestic court 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 draft convention. The Working Group felt that the application of the draft 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 draft convention. (A/CN.9/548, paras. 87, see also A/CN.9/571, para.17).

32. The Working Group eventually agreed that the best approach was to establish the broadest possible scope of application as a departure point, while allowing States for which a broad scope of application might not be desirable to make declarations aimed at reducing the reach of the draft convention. (A/CN.9/571, para.39). It is recognized that in its present form, the draft convention 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 chosen the applicable law.

2. Excluded matters: consumer transactions

33. The draft convention does not apply to electronic communications exchanged in connection with consumer contracts. However, unlike the corresponding exclusion under article 2(a) of the United Nations Sales Convention, the exclusion of consumer transactions under the draft convention is an absolute one, so that consumer contracts would always be excluded even if the personal, family or household purpose of the contracts was not apparent to the other party.

34. 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, since otherwise the applicability of the United Nations Sales Convention would depend entirely on the seller’s ability to ascertain the purpose for which the buyer had bought the goods. As a result, the consumer purpose of a sales contract could not be held against the seller, for the purpose of excluding the applicability of that 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 personal, family or household use. 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. 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 (A/CONF.97/5),[12] article 2, subparagraph (a), of the United Nations Sales Convention was based on the assumption that consumer transactions were international transactions only in “relatively few cases” (A/CN.9/527, para. 86).

35. In the case of the draft convention, however, the Working Group 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 sellers established in another country (A/CN.9/527, para. 87). Since the Working Group recognized that certain rules of the draft convention might not be appropriate in the context of consumer transactions, the Working Group agreed that consumers should be completely excluded from the reach of the draft convention (A/CN.9/548, paras. 101-102).

3. Other excluded matters

36. The draft convention does not apply to transactions in certain financial markets subject to specific regulation or industry standards. The Working Group considered that the financial service sector was subject to well-defined regulatory controls and industry standards that addressed issues relating to electronic commerce in an effective way for the worldwide functioning of that sector and that no benefit would be derived from their inclusion in the draft convention. It was also stated that, given the unique nature of that sector, the relegation of such an exclusion to country-based declarations under draft article 18 would be inadequate to reflect that reality (A/CN.9/558, para. 109).

37. Furthermore, the draft 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, for which special rules would need to be devised (see A/CN.9/527, paras. 45, 55, 62 and 65). The Working Group noted in particular that the potential consequences of unauthorized duplication of documents of title and negotiable instruments—and generally any transferable instrument that entitled the bearer or beneficiary to claim the delivery of goods or the payment of a sum of money—made it necessary to develop mechanisms to ensure the singularity or originality of the relevant document. Finding a solution for that problem required

a combination of legal, technological and business solutions, which had not yet been fully developed and tested (A/CN.9/571, para. 136).

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

38. The draft convention contains a set of rules dealing with the location of the parties. The draft convention does not contemplate a duty for the parties to disclose their places of business (see para. 50), 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.

39. The rebuttable presumption of location established by draft article 6 serves eminently 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 business for a given contract. The current draft 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 (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 draft article 5, subparagraph (h).

40. The draft convention takes a cautious approach to peripheral information related to electronic messages, such as IP 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. However, nothing in the draft 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 (A/CN.9/571, para. 113).

41. Draft article 7 reminds the parties of the need to comply with possible disclosure obligations that might exist under domestic law. The Working Group considered at length various proposals that contemplated a duty for the parties to disclose their places of business, among other information (A/CN.9/484, para. 103; A/CN.9/509, paras. 61-65). The consensus that eventually emerged was that any duty of that kind would be ill-fitted to a commercial law instrument and potentially harmful to certain existing business practices. It was felt that disclosure obligations were typically found in legislation primarily concerned with consumer protection. In any event, to be effective, the operation of regulatory provisions of that type needed to be supported by a number of administrative and other measures that could not be provided in the draft convention (A/CN.9/546, paras. 92-93).

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

42. The draft convention affirms in article 8 the principle contained in article 11 of the UNCITRAL Model Law on Electronic Commerce that contracts should not be denied validity or enforceability solely because they result from the exchange of electronic communications. The draft convention does not venture into determining when offers and acceptances of offers become effective for purposes of contract formation. The Working Group recognized that contracts other than sales contracts governed by the rules on contract formation in the United Nations Sales Convention were in most cases not subject to a uniform international regime. Different legal systems provided various criteria to establish when a contract was formed and the Working Group eventually accepted the view that that no attempt should be made 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 (A/CN.9/528, para. 103; see also A/CN.9/546, paras. 118-121).

43. Article 12 of the draft 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. This rule is inspired by article 14, paragraph 1, of the United Nations Sales Convention and results from an analogy between offers made by electronic means and offers made through more traditional means (see A/CN.9/509, paras. 76-85). The underlying principle to this general rule is the concern that attaching a presumption of binding intention to the use of interactive contracting 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 (A/CN.9/546, para. 107).

44. According to the Working Group's 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 draft 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.

45. However the draft 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 (A/CN.9/509, para. 105; A/CN.9/548, para. 17). Draft article 14 provides that a party who makes an input error may withdraw the communication in question under certain circumstances.

46. It should be noted that draft article 14 deals only with errors that occur in interactions between individuals and automated information systems that do not offer the individual an opportunity to review or correct the errors. Rather than requiring generally that an opportunity to correct errors should be provided, the draft article limits itself to providing consequences for the absence of such a possibility (A/CN.9/548, para. 19). The word "input", which is used to qualify the

notion of "error" in the draft article, is intended to make it clear that the provision only aims at providing means to redress errors relating to inputting wrong data in communications exchanged with an automated message system. The draft article does not deal with other types of error, which should be left for the general doctrine of error under domestic law (A/CN.9/571, para. 190).

D. Form requirements (draft article 9)

47. Article 9 of the draft convention reiterates the basic rules contained in articles 6, 7 and 8 of the UNCITRAL Model Law on Electronic 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 hand-written signatures. However, unlike the Model Law, the draft 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 with contract formation and performance.

48. It should be noted that draft article 9 establishes minimum standards to meet form requirements that may exist under the applicable law. The principle of party autonomy in draft 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 said, party autonomy did not mean that the draft convention empowers the parties to set aside statutory requirements on form or authentication of contracts and transactions (A/CN.9/527, para. 108).

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

49. As is the case under article 15 of the UNCITRAL Model Law on Electronic Commerce, the draft convention contains a set of default rules on time and place of dispatch and receipt of data messages, 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 draft convention and article 15 of the Model Law are not intended to produce a different practical result, but aim at facilitating the operation of the draft 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.

1. "Dispatch" of electronic communications

50. 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 more closely mirror the notion of "dispatch" in a non-electronic environment (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.

2. "Receipt" of electronic communications

51. Article 10 of the draft convention is conceived as a set of presumptions, rather than a firm rule on receipt of electronic communications. Using a notion common to many legal systems, and reflected in domestic enactments of the UNCITRAL Model Law on Electronic Commerce, the draft article 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 data messages need to meet other requirements (such as "processability") in order to be deemed to have been received (see, on this particular point, a comparative study conducted by the Secretariat in A/CN.9/WG.IV/WP.104/Add2, paras. 10-31, available at http://www.uncitral.org/english/workinggroups/wg_ec/wp-104-add2-e.pdf).

52. Despite the different wording used, the effect of the rules on receipt of electronic communications in the draft convention is consistent with the article 15 of the UNCITRAL Model Law on Electronic Commerce. As is the case under article 15 of the Model Law, the draft convention retains the objective test of entry of a communication in an information system to determine when an electronic communication is presumed to be "capable of being retrieved" and therefore "received". The requirement that a message should be capable of being retrieved, which is presumed to occur when the message 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 a data message "becomes available for processing within that information system",[13] which is arguably also the time when the message becomes "capable of being retrieved" by the addressee.

53. Similar to a number of domestic laws, the draft 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"),[14] 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" (A/CN.9/571, para. 157).

54. The draft convention retains the distinction made in article 15 of the Model Law between delivery of messages to specifically 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). One noticeable difference, 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 chose to ignore the addressee's instructions and sent the message to an information system other than the designated system, it would not be reasonable to consider the message 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 messages would be sent, in which case it would be reasonable to presume that it would accept messages through any of its information systems.

55. The draft 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 draft 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. In cases where the addressee has designated an electronic address, but the communication was sent elsewhere, the rule in the draft 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 became aware that the electronic communication has been sent to that address).

56. The only substantive difference, therefore, concerns the receipt of communications in the absence of any designation. In this particular case, the Working Group agreed that practical developments since the adoption of the Model Law justified a departure from the original rule. It was noted in particular that concerns over security of information and communications in the business world had led to the increased use of security measures such as filters or firewalls which might prevent electronic communications from reaching their addressees. Under those circumstances, it was felt that any rules on receipt of electronic communications should necessarily be linked to consent to use a particular electronic address, and should not compel persons who had not agreed to bear the risk of loss of communications that were sent to another address (A/CN.9/571, para. 150).

3. Place of dispatch and receipt

57. The rules on place of dispatch and receipt are essentially the same as in article 15, paragraphs 3 and 4 of the UNCITRAL Model Law on Electronic Commerce.

F. Relationship to other international instruments (draft article 19)

58. The Working Group hopes that States may find the draft convention useful to facilitate the operation of other international instruments—essentially trade-related ones. Besides the UNCITRAL instruments listed in article 19, paragraph 1, other treaties or conventions might be interpreted and applied in the light of the draft convention, insofar as such possibility has not been excluded or limited by declarations made by the State concerned. Draft article 19 intends 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 study done by the Secretariat (see A/CN.9/WG.IV/WP.94; see also A/CN.9/527, paras. 33-48), in a manner that obviates the need for amending individual international conventions.

59. Paragraph 1 of draft article 19 is intended to facilitate electronic transactions in the areas covered by the conventions listed therein, but is not meant to formally amend any of those conventions. By ratifying the draft convention, a State would automatically accept—at the very least—to apply the provisions of the draft convention to electronic communications exchanged in connection with any of the conventions listed in that paragraph. This would provide a domestic solution for a problem originating in international instruments, based on the recognition that domestic courts already have the power to interpret international commercial law instruments. The draft paragraph ensures that a Contracting State would incorporate in its legal system a provision that directs its judicial bodies to use the provisions of the draft convention to address legal issues relating to the use of data messages in the context of those other international conventions (A/CN.9/548, para. 49).

60. In addition to those instruments which, for the avoidance of doubt, are listed in paragraph 1, the provisions of the draft convention may also apply, pursuant to paragraph 2, 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 draft convention has been added to take into account possible concerns of States that may wish to ascertain first whether the draft convention would be compatible with their existing international obligations.

61. Paragraphs 3 and 4 of the draft article add further flexibility by allowing States to add specific conventions to the list of international instruments to which they would apply the provisions of the draft 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 the draft article would exclude the application of the draft convention to the use of electronic communications in respect of all contracts to which another international convention applies. The draft article does not contemplate the possibility for a Contracting State to exclude only certain types or categories of contracts covered by another international convention (A/CN.9/571, para. 56).

Notes

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

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

[3] Ibid., *Fifty-sixth Session, Supplement No. 17* (A/56/17), para. 293.

[4] Ibid., para. 295.

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

[6] Ibid., para. 207.

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

[8] Ibid., para. 212.

[9] Ibid., para. 213.

[10] Ibid., para. 214.

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

[12] *Official Records of the United Nations Conference on Contracts for the International Sale of Goods: documents of the Conference and summary records of the plenary meetings and of the meetings of the Main Committee* (United Nations publication, Sales No. E.81.IV.3), p. 16.

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

[14] See James E. Byrne and Dan Taylor, *ICC Guide to the eUCP*, ICC, Paris, 2002, p. 54.