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Report of the Working Group on Electronic Commerce on the work of its forty-third session, held in New York from 15 to 19 March 2004

Contents

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I. Introduction

1. At its thirty-fourth session (Vienna, 25 June-13 July 2001), the United Nations Commission on International Trade Law (UNCITRAL) endorsed a set of recommendations for future work that had been made by the Working Group on Electronic Commerce at its thirty-eighth session, held in New York from 12 to 23 March 2001. They included, among other topics, the preparation of an international instrument dealing with selected issues on electronic contracting and a comprehensive survey of possible legal barriers to the development of electronic commerce in international instruments.

2. The deliberations of the Working Group on those topics began at its thirty-ninth session, held in New York from 11 to 15 March 2002, when the Working Group considered a note by the Secretariat that contained an initial draft, tentatively entitled "Preliminary draft convention on [international] contracts concluded or evidenced by data messages" (A/CN.9/WG.IV/WP.95, annex I). The deliberations of the Working Group are reflected in the report on the work of its thirty-ninth session (A/CN.9/509). The Working Group resumed its consideration of the preliminary draft convention at its fortieth session, held in Vienna from 14 to 18 October 2002, when it concluded its initial review of the text (A/CN.9/527, paras. 72-126). The Working Group requested the Secretariat to prepare a revised version of the preliminary draft convention for consideration by the Working Group at its forty-first session. The Working Group considered the revised version of the preliminary draft convention (A/CN.9/WG.IV/WP.100) at its forty-first session, held in New York from 5 to 9 May 2003, when it reviewed articles 1-11 (A/CN.9/528, paras. 26-151). The Secretariat was requested to prepare a further revised version of the preliminary draft for consideration by the Working Group at its forty-second session.

3. A more detailed summary of the deliberations of the Working Group during those sessions is contained in the report of the Working Group on the work of its forty-second session, held in Vienna from 17 to 21 November 2003 (A/CN.9/546, paras. 1-24). At its forty-second session, the Working Group considered the newly revised text of the preliminary draft convention (A/CN.9/WG.IV/WP.103, annex). The Working Group reviewed articles 8-15 and requested a number of changes in connection therewith (A/CN.9/546, paras. 39-135).

II. Organization of the session

4. The Working Group on Electronic Commerce, composed of all States members of the Commission, held its forty-third session in New York, from 15 to 19 March 2004. The session was attended by representatives of the following States members of the Working Group: Austria, Brazil, Cameroon, Canada, China, Colombia, Fiji, France, Germany, Honduras, India, Iran (Islamic Republic of), Italy, Japan, Kenya, Mexico, Morocco, Russian Federation, Singapore, Spain, Sudan, Sweden, Uganda and United States of America.

5. The session was attended by observers from the following States: Belarus, Belgium, Botswana, Cuba, Czech Republic, Denmark, Finland, Ghana, Indonesia, Iraq, Ireland, Kuwait, Lesotho, Libyan Arab Jamahiriya, Madagascar, Mongolia, New Zealand, Peru, Philippines, Poland, Qatar, Republic of Korea, Saudi Arabia,

Senegal, Serbia and Montenegro, Syrian Arab Republic, Thailand, Turkey, United Republic of Tanzania, Venezuela and Viet Nam.

6. The session was also attended by the Holy See as a non-member State maintaining a permanent observer mission at United Nations Headquarters.

7. Representatives of the following organizations of the United Nations system and other international organizations attended the session as observers: Economic Commission for Europe, World Bank, World Intellectual Property Organization, Asian-African Legal Consultative Organization, Commonwealth Secretariat, European Commission and the Interparliamentary Assembly of Member Nations of the Commonwealth of Independent States.

8. The following non-governmental organizations were invited by the Commission to attend the session as observers: American Bar Association, Association of the Bar of the City of New York, Center for International Legal Studies, European Law Students' Association, International Chamber of Commerce, International Law Institute, International Union of Latin Notaries and Union internationale des avocats.

9. The Working Group elected the following officers:

Chairman: Jeffrey Chan Wah Teck (Singapore);
Rapporteur: Ligia Claudia González Lozano (Mexico).

10. The Working Group had before it a newly revised version of the preliminary draft convention, which reflected the deliberations of the Working Group at its forty-second session (A/CN.9/WG.IV/WP.108, annex).

11. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Electronic contracting: provisions for a draft convention.
5. Other business.
6. Adoption of the report.

III. Summary of deliberations and decisions

12. The Working Group resumed its deliberations on the newly revised preliminary draft convention contained in the annex to the note by the Secretariat (A/CN.9/WG.IV/WP.108). The decisions and deliberations of the Working Group with respect to the draft convention are reflected in chapter IV. The Secretariat was requested to prepare a revised version of the preliminary draft convention based on those deliberations and decisions for consideration by the Working Group at its forty-fourth session, tentatively scheduled to take place in Vienna from 18 to 22 October 2004.

13. The Working Group held a general discussion on draft articles 5 to 7 bis. The Working Group considered comments which anticipated positions that might be adopted by delegations on the understanding that such comments had no effect on the draft text, which will be formally examined at the forty-fourth session of the

Working Group. 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.

IV. Electronic contracting: provisions for a draft convention

Article 14 [16]. Error in electronic communications

14. The text of draft article 14 [16] was as follows:

"Variant A

"[Unless otherwise [expressly] agreed by the parties,] a contract concluded by a person that accesses an automated information system of another party has no legal effect and is not enforceable if the person made an error in a data message and:

"(a) The automated information system did not provide the person with an opportunity to prevent or correct the error;

"(b) The person notifies the other party of the error as soon as practicable when the person making the error learns of it and indicates that he or she made an error in the data message;

"[(c) The person takes reasonable steps, including steps that conform to the other party's instructions, to return the goods or services received, if any, as a result of the error or, if instructed to do so, to destroy such goods or services; and

"[(d) The person has not used or received any material benefit or value from the goods or services, if any, received from the other party.]

"Variant B

"1. [Unless otherwise [expressly] agreed by the parties,] a contract concluded by a person that accesses an automated information system of another party has no legal effect and is not enforceable if the person made an error in a data message and the automated information system did not provide the person with an opportunity to prevent or correct the error. The person invoking the error must notify the other party of the error as soon as practicable and indicate that he or she made an error in the data message.

"[2. A person is not entitled to invoke an error under paragraph 1:

"(a) If the person fails to take reasonable steps, including steps that conform to the other party's instructions, to return the goods or services received, if any, as a result of the error or, if instructed to do so, to destroy such goods or services; or

"(b) If the person has used or received any material benefit or value from the goods or services, if any, received from the other party.]"

15. A widely shared and strongly supported view was that the draft article should be deleted, as it dealt with substantive matters of contract law that the draft convention should not address. It was stated that errors between individuals and

automated information systems were not substantially different from errors made in traditional means of communication, so that no special rules were needed or advisable. Problems that might arise in an electronic environment should not be solved by the draft convention and should instead be governed by the applicable law. Concern was also expressed about the possible impact of the draft article on any existing laws on error. While the initial version of the draft article (A/CN.9/WG.IV/WP.95, annex I) was only concerned with ensuring the availability of means to correct errors in messages exchanged with automated information systems, the current version deprived the entire contract of its validity, a result that might not be provided for under domestic law.

16. Another argument against retaining the draft article was that the provision might interfere with the operation of financial systems, stock markets or commodity trades if the parties were allowed to later withdraw from their offers or bids on the basis that they had been the result of a mistake. Legal uncertainty in those time-critical markets required that parties should be bound even if they acted unintentionally. The draft article, it was stated, was more appropriate for consumer protection than for the practical requirements of commercial transactions. Furthermore, the draft article, by focusing on automated information systems, was not technology-neutral, being thus inconsistent with one of the basic principles of the UNCITRAL Model Law on Electronic Commerce.[1] All that was needed in connection with such systems was a positive rule affirming their use in the context of contract formation, but not a substantive rule dealing with errors in automated transactions.

17. The countervailing view, which also gained broad and strong support, was that the draft article contained useful provisions to deal with particular problems that arose in electronic commerce. There was a need for such a provision in the light of the relatively higher risk of human errors, such as keystroke errors, being made in transactions made through automated information systems than in more traditional modes of contract negotiation. For example, while it would be unlikely for a person to deliver documents unintentionally to a post office, in practice there were precedents where persons had claimed not to have intended to confirm a contract by hitting “Enter” on a computer keyboard or clicking on an “I agree” icon on a computer screen. Thus, the draft article was not intended to be media-neutral; on the contrary, it was intended to deal with a specific issue affecting certain forms of electronic communications. However, in doing so, the draft article did not overrule existing law on error, but merely offered a meaningful addition to it by focusing on the importance of providing means of having the error corrected.

18. It was pointed out that the contract law of some legal systems confirmed the need for the draft article. That was the case, for example, in connection with rules that required a party seeking to avoid the consequences of an error to show that the other party knew or ought to have known that a mistake had been made. While there were means of providing such proof if there was an individual at each end of the transaction, awareness of the mistake was almost impossible to demonstrate when there was an automated process at the other end.

19. However, most expressions of support for the principles underlying the draft article also emphasized the need for reformulating it so as to define more narrowly its scope of application and its operative provisions. The draft article, it was suggested, should be circumscribed to errors that occurred in interactions between individuals and automated information systems that did 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 should limit itself to providing consequences for the absence of such a possibility. Those consequences, it was further suggested, should be concerned only with avoiding the effects of errors contained in a data message and should not automatically affect the validity of the contract.

20. It was suggested that the draft article could provide, for example, that in a transaction involving an individual and an automated information system, the individual might avoid the effect of an unintended action of that individual that resulted from an error made by the individual in dealing with the automated information system of another person if that system did not provide an opportunity for the correction of that error. Such a provision might be further subject to the remaining conditions set out in subparagraphs (b) to (d) of variant A of the draft article and might be complemented with a provision to the effect that, if the conditions set forth in the draft article were not met, the consequences of the error would be as provided for by other laws, including the law on error, and by any agreement between the parties.

21. The proposals to reformulate the draft article so as to narrow its scope of application and limit the consequences contemplated by it were welcomed by the Working Group. Nevertheless, several comments emphasized the view that the preferable alternative should be simply to delete the draft article rather than to attempt to reformulate it.

22. Questions were raised concerning the proposed focus on actions taken by individuals and on the right of the individual to correct any errors made in communications with automated information systems. The question was asked whether it would be appropriate to limit a provision on errors only to errors committed by individuals, since errors might also occur in communications initiated by automated information systems. Furthermore, it was stated that it would be problematic to introduce the notion of "individual", since any contract negotiated through automated information systems would ultimately be attributable to the legal entity that such an individual would represent. Any new version of the draft article should make it clear that the right to correct the mistake was not a right of the individual but of the party or legal entity on whose behalf the individual was acting. Lastly, if the draft article was retained, the Working Group should consider whether the provision should also deal with electronic mails sent by mistake, since there was no reason for limiting the provision only to communications with automated systems.

23. Criticism was also voiced on the basis that the proposed new version would retain parts of the draft article that conflicted with the existing law on error in some legal systems. That was the case, in particular, with respect to subparagraphs (c) and (d) of variant A, since some legal systems did not subject a person's right to avoid a contract that was vitiated by mistake to the types of condition set forth in those provisions. Also, if the draft article was retained, it should make it clear that it dealt with unintentional acts, but not with other types of error that might occur, for example, when the sending party was unconscious at the point of sending.

24. Furthermore, it was stated that the notion of avoiding the consequences of an act might not be understood in the same manner in different legal systems. In some legal systems, for example, that notion would inevitably be interpreted as referring to the validity of an act and lead to discussions as to whether the act was null and void or voidable at the party's request. One alternative solution might be to focus on

a party's ability to rely on a data message erroneously transmitted or drafted or to provide that a message that resulted from an error could not be invoked against the person who committed the error, if that person had not had an opportunity to review the message and correct the error. In response, it was stated that the proposed shift in approach should be carefully considered in the light, for instance, of subparagraphs (c) and (d) in variant A, which indicated that in some cases, goods or services might have been provided in reliance on the error. The party receiving the message should be able to rely on the message, despite the error, up to the point of receiving a notice of error.

25. Another alternative suggestion was to recast the draft article as a presumption according to which, save for proof to the contrary, a statement that a person had acted in error in dealing with an automated system would be presumed to be true if the automated information system did not provide a method to correct the error. Such a presumption would leave it for the domestic law to determine the consequences of the alleged error on the contract and the remedies of the parties in that connection. With the same intention of avoiding interference with any domestic law on error, it was also proposed that the draft article should elaborate on the distinction between the effects of the error and the right to correct or withdraw the error. If the rule was expressed in terms of nullifying or avoiding or having an impact on the consequences of the error, it would invade the sphere of domestic laws on error. Instead, the draft article should provide for the right—unconditional or subject to specific conditions—of the individual, or the party on whose behalf the individual acted, exceptionally to withdraw the erroneous statement.

26. The Working Group considered at length the various views that were expressed and the different alternative approaches to the draft article proposed. The prevailing view within the Working Group was that, despite the strong expressions of support for the deletion of the provision, the draft article deserved to be retained, in a revised form, for further consideration. The Secretariat was requested to reformulate the draft article in a manner that removed the focus from the notion of avoidance of a contract or the effects of a data message and focused instead on providing the person in error with an opportunity to correct the error or to withdraw from its manifestation of intent, possibly subject to further conditions on the basis of subparagraphs (b), (c) and (d) of variant A. An additional provision might be included to the effect that the general law on error was not otherwise affected.

[Article X. Declarations on exclusions

27. The text of draft article X was as follows:

> "[1. Any State may declare 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.
>
> "2. Any State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not apply this Convention to the matters specified in its declaration.
>
> "3. Any declaration made pursuant to paragraphs 1 and 2 of this article shall take effect on the first day of the month following the expiration of [six] months after the date of its receipt by the depositary.]"

Paragraph 1

28. It was recalled that, at its forty-first session, the Working Group had agreed to consider, at a later stage, a provision allowing a contracting State to exclude the application of paragraph 1 (b) of article 1 along the lines of article 95 of the United Nations Convention on Contracts for the International Sale of Goods (the "United Nations Sales Convention")[2] (A/CN.9/528, para. 42). The Working Group noted that it had not yet concluded its deliberations on possible exclusions to the preliminary draft convention under draft article 2 (A/CN.9/527, paras. 83-98). It was further noted that, as drafted, paragraph 1 was premised on the assumption that variant A of paragraph 1 of draft article 1 would ultimately be adopted.

29. It was pointed out that the United Nations Sales Convention included a provision extending its scope of application when the rules of private international law led to the application of the law of a contracting State (para. 1 (b) of article 1), and also allowed a State to declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it would not be bound by that subparagraph (article 95) and that the draft convention should contain a corresponding provision.

30. On that basis, the Working Group agreed to retain paragraph 1 and to delete the square brackets therefrom.

Paragraph 2

31. In response to a question, it was noted that paragraph 2 was distinct from paragraph 1 in that paragraph 1 intended to exclude the application of the convention altogether where the rules of private international law would otherwise lead to its application, whereas paragraph 2 was concerned with the exclusion of specific matters such as, for example, the exclusion of matters relating to powers of attorney or concerning family law matters.

32. It was stated that, given the existence of draft article 2, the circumstances in which a State should be afforded an opportunity to exclude other matters from the draft convention should be restricted. In response, it was noted that draft article X had been added as a possible alternative, in the event that consensus could not be reached on possible exclusions under draft article 2 to the preliminary draft convention. Additionally, it was stated that, while draft article 2 was concerned with the exclusion of certain types of contractual arrangement, other such matters could arise that a State would also wish to exclude from the coverage of the convention. It was stated that paragraph 2 of draft article X provided a State with flexibility to exclude such matters and that therefore, independently of draft article 2, paragraph 2 was a provision critical to the capability of States to ratify and utilize the convention.

33. Support was expressed for paragraph 2 of draft article X as currently drafted. However, it was suggested that the paragraph should be reformulated to take account of the fact that the types of matter that might need to be excluded by any given State might change depending on the evolution of technology in legal communications. For that reason, a declaration in that respect might need to be made after the deposit of an instrument of ratification, acceptance, approval or accession. To accommodate that fact, it was suggested that the words "at any time" should be inserted into the clause.

34. The Working Group agreed to retain the text in paragraph 2 and include the term "at any time" instead of "at the time of the deposit of its instrument of ratification, acceptance, approval or accession". It was recognized, however, that paragraph 2 of draft article X could not be assessed in isolation and that it might be necessary to review it in the light of the final decision taken in respect of draft article 2.

Paragraph 3

35. A question was raised as to whether the time when a declaration should take effect should coincide with the date that the convention entered into force for the State that made the declaration. It was noted that, while there were precedents in some international instruments where the time when a declaration took effect coincided with the time when the instrument entered into force for the declaring States, there were other precedents where those times did not so coincide.

36. The Working Group noted that article 97, paragraph 3, of the United Nations Sales Convention provided, in part, that a "declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a 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". A similar provision was contained in paragraph 3 of article 26 of the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit.[3] It was agreed that a provision along those lines should be included in the draft paragraph.

37. Subject to those amendments, the Working Group agreed to retain the text of paragraph 3.

Article Y. Communications exchanged under other international conventions

38. The text of draft article Y was as follows:

"Variant A

"1. Except as otherwise stated in a declaration made in accordance with paragraph 2 of this article, a State Party to this Convention [may declare at any time that it] undertakes to apply the provisions of [article 7 and] chapter III of this Convention to the exchange [by means of data messages] of any communications, declarations, demands, notices or requests [, including an offer and acceptance of an offer,] that the parties are required to make or choose to make in connection with or under any of the following international agreements or conventions to which the State is or may become a Contracting State:

"Convention on the Limitation Period in the International Sale of Goods (New York, 14 June 1974)[4] and Protocol thereto (Vienna, 11 April 1980)[5]

"United Nations Convention on Contracts for the International Sale of Goods (Vienna, 11 April 1980)[2]

"United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 17 April 1991)[6]

"United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 11 December 1995)[3]

"United Nations Convention on the Assignment of Receivables in International Trade (New York, 12 December 2001).[7]

"[2. Any State may declare 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 private commercial law matters to which the State is a contracting State and which are identified in that State's declaration.]

"3. Any State may declare at any time that it will not apply this Convention [or any specific provision thereof] to international contracts falling within the scope of [any of the above conventions.] [one or more international agreements, treaties or conventions to which the State is a Contracting Party and which are identified in that State's declaration.]

"4. Any declaration made pursuant to paragraphs 1 and 2 of this article shall take effect on the first day of the month following the expiration of [six] months after the date of its receipt by the depositary.

"Variant B

"1. Any State may at any time make a reservation to the effect that it shall apply this Convention [or any specific provision thereof] only to data messages in connection with an existing or contemplated contract to which, pursuant to the law of that State, a specific international convention clearly identified in the reservation made by that State is to be applied.

"2. Any declaration made pursuant to paragraph 1 of this article shall take effect on the first day of the month following the expiration of [six] months after the date of its receipt by the depositary.

"Variant C

"1. Any State may declare at any time that it will not apply this Convention [or any specific provision thereof] to data messages in connection with an existing or contemplated contract to which one or more of the international conventions referred to in article 1, paragraph 1, are to be applied, provided that the relevant conventions shall be clearly identified in the declaration made by that State.

"2. Any declaration made pursuant to paragraph 1 of this article shall take effect on the first day of the month following the expiration of [six] months after the date of its receipt by the depositary."

General remarks

39. The Working Group noted that the draft article was intended to offer a possible common solution for some of the legal obstacles to electronic commerce under existing international instruments that had been identified in a survey contained in an earlier note by the Secretariat (A/CN.9/WG.IV/WP.94). At the fortieth session of the Working Group, it had been generally agreed 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 variant A (A/CN.9/527, paras. 33-48).

40. The Working Group noted that variant A was intended to remove doubts as to the relationship between the rules contained in the draft convention and rules contained in other international conventions. It was not the purpose of the variant to effectively amend or otherwise affect the application of any other international convention. In practice, the draft article would have the effect of an undertaking by a contracting State to use the provisions of the draft convention to remove possible legal obstacles to electronic commerce that might arise under those conventions and to facilitate their application in cases where the parties conducted their transactions through electronic means.

41. The Working Group noted that variant B had been included following a proposal submitted at the forty-second session of the Working Group (A/CN.9/WG.IV/XLII/CRP.2). That variant was logically related to variant A of draft article 1. Its practical effect would be to limit the applicability of the draft convention only to messages exchanged under conventions specifically identified by contracting States. Variant C, which had also been originally submitted with variant B, had been included in the event that the Working Group decided to choose variant B of draft article 1, so as to give the contracting States the option of excluding the application of the draft convention in respect of certain specific conventions. It was noted that if either variant B or variant C were to be adopted, the title of the draft article would need to be changed to "reservations".

Relationship between draft articles Y and 1

42. The Working Group held an extensive discussion on the relationship between draft article Y and the definition of the scope of application of the draft convention under draft article 1.

43. The view was expressed that the relationship between the two draft articles was unclear and that draft article Y was not necessary. It was stated that, in many legal systems, the draft convention could be applied to the use of data messages in the context of a contract covered by an international convention, including any of those conventions listed in draft article Y, simply by virtue of draft article 1, without the need for a specific reference to a convention governing such a contract in draft article Y. However, by providing a list of conventions, draft article Y appeared to suggest that the draft convention would not apply to data messages exchanged in connection with contracts covered by any convention other than those listed therein. It would be preferable simply to provide the contracting States with the possibility of expressly excluding the matters they did not want to have covered by the draft convention.

44. In response, it was observed that, as currently drafted, draft articles 1 and Y distinguished between three groups of international contracts. The first group, which probably included the vast majority of international contracts other than sales contracts covered by the United Nations Sales Convention, comprised international contracts that were not covered by any existing uniform law convention. The second group comprised contracts falling under existing international conventions other than those listed in draft article Y or expressly mentioned by a contracting State in a declaration made under draft paragraph 2. The last group comprised contracts governed by any of the conventions listed in paragraph 1 or mentioned in a declaration made under paragraph 2 of draft article Y. The first group of contracts, it

was stated, fell under the scope of application of the draft convention if they met 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 Y, paragraphs 1 and 2. However, data messages exchanged in connection with contracts belonging to the second group would not be covered by the draft convention.

45. That result, it was further observed, followed from earlier deliberations of the Working Group, in particular from the recognition, in connection with a survey of possible legal obstacles in selected international instruments that had been conducted by the Secretariat (A/CN.9/WG.IV/WP.94), that the possible problems raised by certain existing conventions might require specific treatment and that it might not be appropriate to attempt to address those problems in the context of the draft convention (A/CN.9/527, para. 29; see also paras. 24-71). Typical examples included international conventions dealing with negotiable instruments or transport documents.

46. While the Working Group acknowledged that other interpretations were possible as to the interplay between draft articles 1 and Y, it was generally accepted that, as currently drafted, draft articles 1 and Y appeared to be based on a distinction between those three types of contract. The Working Group agreed that it was important to avoid the appearance of a conflict between draft articles 1 and Y and that the Working Group should consider ways of clarifying the relationship between the two provisions when it considered draft article 1.

Choice between the three variants

47. The view was expressed that variant B had the advantage over variant A of giving the contracting States the freedom, at an appropriate time, to choose those situations covered by international instruments to which the provisions of the draft convention should apply. Variant A, in turn, contemplated the automatic application of the provisions of the draft convention to data messages exchanged in connection with contracts covered by the conventions listed therein, with the possibility of further additions or exclusions by way of declarations made under draft paragraphs 2 or 3, as appropriate. It was stated that variant A placed upon the contracting States the burden of reviewing their treaty obligations in the light of the draft convention to ensure that the provisions of the draft convention would not create difficulties in the operation of any existing instrument.

48. While there was some support for variant B, the widely prevailing view was that variant A was preferable and should be retained as the basis for the future deliberations of the Working Group. It was pointed out that variant A ensured a higher degree of legal certainty by specifically listing a number of conventions, the operation of which would benefit from the provisions of the draft convention. It was also widely felt that variant B was not conducive to the degree of harmonization envisaged by the Commission, as it would leave it to each contracting State to choose unilaterally the transactions covered by an international instrument to which the provisions of the draft convention should apply.

Variant A, paragraph 1

49. The Working Group was reminded that one of the principles that underlay its work towards the removal of possible legal obstacles to electronic commerce in existing international instruments was that efforts should be made to formulate

solutions that obviated the need for amending individual international conventions. Draft paragraph 1 of article Y was intended to facilitate electronic transactions in the areas covered by the conventions listed therein, but was not meant to formally amend any of those conventions. For that purpose, the draft paragraph contemplated that, by ratifying the draft convention, a State would automatically undertake to apply the provisions of the draft convention to data messages exchanged in connection with any of the conventions listed in paragraph 1. That solution, it was stated, aimed at providing a domestic solution for a problem originating in international instruments, based on the recognition that domestic courts already had the power to interpret international commercial law instruments. The draft paragraph ensured that a contracting State would incorporate in its legal system a provision that directed 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.

50. Support was expressed for the approach envisaged in the draft paragraph. It was stated that extensive consultations with treaty authorities in some countries had indicated that there were no legal objections under traditional treaty law and practice or under the Vienna Convention on the Law of Treaties[8] to the approach proposed in the draft paragraph. While the matter might still require further study and consultation, the proposed solution was welcome in view of the widely shared goal of avoiding amendments to other conventions or issuing authoritative interpretations of their terms.

51. Questions were nevertheless raised concerning the feasibility and implications of the approach proposed in the draft paragraph. It was stated that, if the draft convention was meant to clarify the meaning of terms that were used in other international conventions, that objective should be clearly stated in paragraph 1 of draft article Y. In response, it was firstly noted that the intended effect of the draft convention in respect of contracts covered by other international conventions was not merely to interpret terms used elsewhere, but to offer substantive rules that allowed those other conventions to operate effectively in an electronic environment. Secondly, and more importantly, it was stated that expressly declaring that the draft convention intended to interpret terms used in existing international conventions might be objectionable under public international law, as an authoritative interpretation of an existing treaty could only be issued by the contracting parties to the treaty.

52. It was pointed out that draft article Y referred to “communications, declarations, demands, notices or requests” that might be exchanged by the parties, whereas draft article 1 referred to “the use of data messages in connection with an existing or contemplated contract”. The Working Group took note of that point and agreed that it should revert to it when considering draft article 1.

53. The Working Group noted that the language in the first set of square brackets was intended to give contracting States the flexibility to decide, by a declaration that might be made at any time, whether to apply the provisions of the draft convention to data messages exchanged in connection with contracts covered by any or all of the conventions listed in paragraph 1. There was support for that approach, which was stated to have the advantage of avoiding the impression that the draft article aimed at amending existing conventions. Indeed, the words “may declare at any time” emphasized that the decision to apply the draft convention in those situations was not the result of a treaty obligation, but the consequence of a unilateral decision of the respective contracting State. The Working Group was

initially inclined to retain the words "may declare at any time that it" by deleting the square brackets around them. However, it was pointed out that, by doing so, the Working Group would render the extension of the provisions of the draft convention to other instruments, which currently operated automatically upon ratification, subject to a later declaration by the contracting State. It was noted that such a result would be undesirable, since it would reduce the legal harmonization effect of the draft provision and would counter the inner logic of the draft article, as evidenced by the opening sentence in draft paragraph 1 and the link between that paragraph and draft paragraph 3. In view of those considerations, the Working Group eventually agreed that the words "may declare at any time that it" should be deleted.

54. It was noted that the specific reference to the substantive provisions of the draft convention contained in chapter III 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. Against that background, the Working Group proceeded to consider whether the draft paragraph should also refer to other provisions of the draft convention. It was proposed that the reference to draft article 7 and chapter III should be replaced with a reference to articles 2 to 6 and chapter III. It was stated, in that connection, that the provisions of draft article 7, like those of article 1, were not suitable to be applied in the context of other international conventions, since they might interfere with the existing interpretation of those conventions. Draft articles 2 to 6, in turn, contained substantive provisions that supported the operation of chapter III. Another proposal was not to refer to draft article 7 but to draft articles 7 bis, article 3, except for subparagraph (a), and articles 4 and 5. In particular, there were objections to including a reference to draft article 2, as it was considered that the exclusions from the scope of application of the draft convention should not be incorporated in draft article Y, paragraph 1, since each convention had its rules on excluded matters and there should be no overlap between possibly differing sets of exclusions.

55. Having considered the various views concerning which cross references should and which should not be included in the draft paragraph, the Working Group became increasingly aware of the difficulty of drawing up a comprehensive list of provisions. It was suggested, in that connection, that a list might not be necessary and might even present some disadvantages. It would be preferable, it was stated, to leave it for a body applying the draft convention to establish which provisions might be relevant in respect of the exchange of data messages in connection with any of the conventions listed in the draft paragraph. If any provision in the draft convention was not appropriate for certain transactions, that circumstance should be clear to a reasonable person applying the draft convention.

56. It was suggested that it was not appropriate to list international agreements or conventions that had not yet entered into force under paragraph 1 of draft article Y. Two of the conventions listed under variant A of draft article Y had not yet entered into force, namely, the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade[6] and the United Nations Convention on the Assignment of Receivables in International Trade.[7]

57. The question was raised as to whether it was appropriate under public international law or treaty practice to refer to instruments that had not yet entered into force. In response, it was pointed out that there were several precedents for references in a convention to international instruments that had not yet entered into force at the time the convention had been drafted. One example that resulted from

the work of UNCITRAL was the preparation, at the time of the finalization of the United Nations Sales Convention, in 1980, of a protocol to adapt the Convention on the Limitation Period in the International Sale of Goods[4] of 1974, at that time not yet in force, to the regime of the United Nations Sales Convention.

58. Furthermore, it was important to develop forward-looking rules that stood the passage of time. The rule in the draft paragraph should be flexible enough to accommodate a future entry into force of one or other convention without requiring it to be amended at a later stage. Nevertheless, it was agreed that the consideration of the matter by the Working Group might be aided by the provision, in due course, of further information on treaty practice in that regard.

59. Turning to the formulation of the draft paragraph, the Working Group agreed to retain the words "by means of data messages", as well as the words "including an offer and acceptance of an offer" and to remove the square brackets around them. Subject to those amendments and its earlier deliberations, the Working Group generally approved the draft paragraph.

Variant A, paragraph 2

60. The view was expressed that the reference to "any other international agreement or convention on private commercial law matters" unnecessarily restricted the application of paragraph 2. It was suggested that the draft convention could have value for many States in connection with matters other than those relating strictly to private commercial law. On that basis, it was suggested that the words "on private commercial law matters" should be deleted. Some support was expressed for that proposal.

61. A concern was expressed that the removal of the words "on private commercial law matters" could result in a State applying the draft convention to situations covered by other international instruments for which the provisions of the draft convention were not appropriate, which might run counter to that State's obligations under those other instruments. However, it was noted that the possibility that a State might take legislative action that was inconsistent with its international obligations existed independently of paragraph 2. In response, it was emphasized that paragraph 2 did not impose obligations upon States, but merely provided States with an opportunity to make a declaration that the draft convention applied to other international instruments. It was stated that paragraph 2 had been premised on the assumption that a State would only make use of that option after it had undertaken a thorough analysis to determine if its application was appropriate to the international instrument in question.

62. Nonetheless, in order to allow a broader range of instruments access to the regime of the draft convention, it was suggested that paragraph 2 could refer to instruments bearing a relationship to the mandate of UNCITRAL. The Working Group agreed with that suggestion and asked the Secretariat to revise paragraph 2 with language that tied the types of instrument to those that related to the mandate of UNCITRAL.

63. A suggestion was made to include the words "at any time" instead of the words "at the time of the deposit of its instrument of ratification, acceptance, approval or accession". It was stated that that proposal was consistent with a decision already taken in respect of draft article X, paragraph 2 (see para. 33 above). The Working Group agreed with that suggestion and requested the Secretariat to revise paragraph 2 accordingly.

Variant A, paragraph 3

64. It was suggested that the phrase "or any specific provision thereof" should be deleted for the reason that a State choosing to adopt the draft convention should not be permitted to apply only some of the provisions of the draft convention. It was stated that such an approach would create uncertainty as to which provisions of the draft convention applied in any given jurisdiction. However, some support was expressed for the retention of those words as it allowed States that could not adopt the convention as a whole to apply at least part of the draft convention. That suggestion did not receive support. The Working Group agreed to delete the words "or any specific provision thereof".

65. It was suggested that, of the two alternative bracketed texts set out in paragraph 3, the first, "any of the above conventions", was preferable, but that, given that paragraph 2 set out an option for States that was presumably revocable, whereas paragraph 1 imposed an obligation, the reference should be modified to read "any of the above conventions listed under paragraph 1".

66. However, some support was expressed for the second alternative, "one or more international agreements, treaties or conventions to which the State is a Contracting Party and which are identified in that State's declaration". It was suggested that that text allowed a State greater flexibility in dealing with any concerns it might have about the relationship of the draft convention to other international instruments to which it might be a party. It was stated that the second alternative provided flexibility for States to ensure that a matter that a State did not want covered was, in fact, not covered and that that flexibility would facilitate adoption of the draft convention. In response it was noted that the concern could be met by providing that the convention only applied to contracts covered by the conventions listed in paragraph 1 or not covered by any international instrument. To that end, the words "including any of the conventions listed in paragraph 1" could be added following the words "any of the above conventions".

67. A question was raised as to the scope of draft article Y in respect of contracts that would become subject to international instruments in the future. For example, a contract relating to the licensing of software, unless it was excluded in draft article 2 of the draft convention, would fall within the scope of the draft convention. If, however, a convention relating to that subject matter was subsequently made, then that contract would fall outside the draft convention on the basis that that later convention was neither listed in paragraph 1 nor the subject of a declaration under paragraph 2. In response it was stated that, in that case, if the State wished the draft convention to apply, it would ensure that a reference was made in the later convention, or would submit a declaration in respect of that convention under paragraph 2 of draft article Y. In any event, that concern was not logically related to the draft paragraph and should be discussed in relation to draft article 1 (see also para. 76 below).

68. Having regard to the differing views as to the appropriate interpretation of the draft article, a proposal was made to combine the two alternative bracketed texts currently contained in paragraph 3, to the effect that any State might declare at any time that it would not apply the draft convention to international contracts that fell within the scope of one of more international agreements, treaties or conventions, including those listed under paragraph 1, to which the State was or might become a party and which were identified in that State's declaration.

69. The view was expressed that the reference to "international contracts" was not consistent with the drafting approach taken in paragraphs 1 and 2, which focused on exchanges by means of data messages of any communications relating to an international agreement. It was agreed that the Secretariat should review the language used in paragraph 3 and align it with other paragraphs of draft article Y.

Variant A, paragraph 4

70. It was agreed that paragraph 4 should be reformulated so as to align the text with the amendments to paragraph 3 of draft article X that had been agreed upon (see paras. 35-37 above). On that basis, it was decided that language along the lines of that contained in the first sentence of paragraph 3 of article 97 of the United Nations Sales Convention should be included in paragraph 4. Subject to those amendments, the Working Group agreed to retain the text of paragraph 4.

Article 1. Scope of application

71. The text of draft article 1 was as follows:

"1. This Convention applies to the use of data messages in connection with an existing or contemplated contract between parties whose places of business are in different States:

"Variant A

"(a) When the States are Contracting States;

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

"(c) When the parties have agreed that it applies.

"Variant B

"… when these States are Parties to this Convention and the data messages are used in connection with an existing or contemplated contract to which, pursuant to the law of these States Parties, one of the following international conventions is to be applied:

"Convention on the Limitation Period in the International Sale of Goods (New York, 14 June 1974)[4] and Protocol thereto (Vienna, 11 April 1980)[5]

"United Nations Convention on Contracts for the International Sale of Goods (Vienna, 11 April 1980)[2]

"United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 17 April 1991)[6]

"United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 11 December 1995)[3]

"United Nations Convention on the Assignment of Receivables in International Trade (New York, 12 December 2001).[7]

"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.

"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."

General remarks: relationship between draft articles 1 and Y

72. At the beginning of its deliberations on draft article 1, the Working Group decided that, in view of its earlier decision to retain only variant A of draft article Y (see para. 47 above), variant B of draft article 1 had become redundant. The Working Group therefore agreed to use only variant A as a basis for its discussions on draft article 1.

73. The Working Group was, however, reminded of the fact that its earlier discussions on draft article Y had not exhausted the questions pertaining to the relationship between that provision and the provisions on the scope of application of the draft convention, which the Working Group had agreed to return to once it had reached draft article 1 (see para. 45 above).

74. There was general agreement within the Working Group that, once the conditions of paragraph 1 of the draft article were met, the draft convention would automatically apply to data messages exchanged in connection with international contracts that were not governed by any existing international convention. The views differed only with regard to messages relating to contracts governed by existing international conventions.

75. The prevailing view within the Working Group was that, in those cases, the combined effect of variant A of draft article 1 with draft article Y, paragraphs 1, 2 and 3, would be that, by ratifying the draft convention, a contracting State would make it clear that the provisions of the draft convention applied to messages exchanged in connection with contracts falling under any of the international conventions referred to in draft article Y, paragraph 1, or mentioned in a declaration made in accordance with draft article Y, paragraph 2, and which were not subject to a particular exclusion under draft article Y, paragraph 3. Any other reading of draft articles 1 and Y, it was stated, might place the contracting States under the unreasonable burden of having to review their entire body of treaty and conventional law so as to ascertain whether the draft convention would be compatible with existing international obligations.

76. That view, however, was not unanimously shared and strong arguments were made to the effect that the provisions of the draft convention might also be given broad application, even in respect of data messages relating to contracts that were covered by an international instrument not listed in draft article Y, paragraph 1, or in a declaration made under draft article Y, paragraph 2. Under that option, the provisions of the draft convention would also apply to those data messages unless and until the relevant contracting State had made a declaration expressly excluding the application of the provisions of the draft convention under draft article Y, paragraph 3. In support of that view, it was stated that the list of instruments in draft article Y, paragraph 1, or any declaration made under draft article Y, paragraph 2, 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.

77. In that connection, the view was expressed that there was an intermediate situation that was not adequately addressed by the understanding given to draft articles 1 and Y by the prevailing view within the Working Group. It was stated that a problem might arise in respect of exchanges of data messages under contracts that were not currently covered by any international convention but that might in the future become the subject of an international uniform law instrument. Presently, those data messages would fall under the draft convention if they met the requirements of draft article 1, paragraph 1. A narrow reading of draft article Y, as favoured by the majority, would, however, lead to the undesirable result that, once those contracts became the subject of a new international instrument, the data messages relating to them would automatically fall outside of the draft convention. In response, it was pointed out that the draft convention did not contemplate a solution for such a situation, but nothing in the draft convention prevented States that, in the future, negotiated a new convention intended to govern a specific type of contract from making reference to the draft convention or, if they were themselves contracting parties to the draft convention, to subsequently issue declarations of inclusion under draft article Y, paragraph 2.

78. The Working Group proceeded to consider possible additional provisions aimed at clarifying the relationship between draft articles 1 and Y. It was agreed that the Working Group could consider inserting an additional paragraph in draft article 1, or immediately thereafter, according to which the draft convention would not apply to the exchange of data messages that fell under draft article 1, whenever the contract to which those data messages related was governed by an international convention, treaty or agreement which was not referred to in draft article Y, paragraph 1 and was not the subject of a declaration made by a contracting State under draft article Y, paragraph 2.

79. That new provision, it was further proposed, should include, as an alternative option within square brackets, another provision to the effect that the draft convention would apply to the exchange of data messages that fell under draft article 1 even if the existing or contemplated contract to which those data messages related was governed by an international convention, treaty or agreement that had not been expressly referred to in draft article Y, paragraph 1, or had not been the subject of a declaration made by a contracting State under draft article Y, paragraph 2, as long as such application had not been excluded pursuant to a declaration made under draft article Y, paragraph 3. It was further suggested that the second option might be combined with a provision that allowed a contracting State to generally exclude the possibility of an extended application of the provisions of the draft convention to matters covered in international conventions other than those listed in draft article Y, paragraph 1. It was noted, however, that either option might require consequential adjustments in draft article Y and that not all provisions of draft article Y might be compatible with one or other option. Furthermore, any provisions that contemplated a broad application of the convention in connection with matters covered by other international conventions might need to be circumscribed to international commercial law instruments or trade-related conventions relevant to the mandate of UNCITRAL.

80. While the Working Group took note of the reiterated objections to admitting a broad application of the draft convention, it was recognized that the Working Group could not close the matter at the current stage and that both possibilities should be contemplated in a revised version of the draft convention for future consideration by the Working Group.

81. The view was expressed that, regardless of the final decision that might be taken in connection with those two options, the relationship between draft articles 1 and Y might be further clarified if paragraph 1 of draft article Y were to be incorporated into draft article 1 or at least placed closer to draft article 1. In response, it was observed that paragraph 1 of draft article Y could not be dissociated from paragraphs 2 and 3 of that article. However, to the extent that those provisions dealt with declarations by the contracting States, they were better placed among the final provisions of the draft convention, in accordance with established treaty practice. Furthermore, it was noted that draft article 1 provided an autonomous scope of application for the draft convention. By virtue of draft article Y, the provisions of the draft convention might also apply to data messages relating to contracts governed by other conventions. However, the draft convention did not apply as such to those other conventions.

Additional provision on purpose

82. The Working Group generally agreed that it would be useful to include a provision in the draft convention, either as a preambular clause or as an operative article, that stated the general purpose of the draft convention. One such proposal was to state that the draft convention had the purpose of affirming the liberty of choice and the interchangeability of media and technologies in the context of international commerce, in particular in the context of international contracts, to the extent that the means used complied with the purpose of the relevant rules of law. Other possible elements, it was suggested, might be considered by the Working Group at a later stage.

Definition of substantive scope of application in paragraph 1

83. The view was expressed that the phrase "in connection with an existing or contemplated contract" was too broad and that it might suggest that the provisions of the draft convention would apply to the exchange of communications or notices between the parties to a contract and third parties, whenever those communications had a "connection" to the contract. It was stated that certain contracts might require, for example, notification to a public authority, and that the current wording of the draft paragraph seemed to authorize that such notifications be given electronically. Therefore, it was suggested that the current text of the draft paragraph should be reworded to make it clear that the draft convention applied only to exchanges between the parties to an existing or contemplated contract. The Working Group concurred with that suggestion and agreed that appropriate language should be included in a future version of the draft paragraph.

84. The view was expressed that it was inaccurate for the draft paragraph to refer to "parties" of a contemplated contract, since the notion of parties to a contract presupposed that a contract already existed. It might be better to refer instead to "parties to the negotiation of a contemplated contract". In response, it was pointed out that the draft convention was also meant to apply to communications made at a time when no contract—and possibly not even a negotiation of a contract—had yet come into being. Draft article 11, dealing with invitations to make offers, was an example of such a case. The Working Group acknowledged, however, that the wording of the draft paragraph might be improved.

85. The view was expressed that the expression "existing or contemplated contract" might be understood as referring to a contract in existence at the time the draft convention entered into force. The Working Group agreed to request the

Secretariat to offer alternative language in order to avoid that impression. The Working Group further agreed that the draft convention might need to include a specific provision containing transitional rules to deal with the time when the provisions of the convention would take effect and how they would affect contracts concluded or in negotiation at such time.

86. Having considered those observations, the Working Group noted that the wording of paragraph 1 might generally require further adjustment, in particular with a view to harmonizing it with the wording of draft article Y. The Secretariat was requested to bear that in mind when formulating a revised version of the draft paragraph.

Paragraph 1 (a)

87. The view was expressed that subparagraph (a) of paragraph 1 was not necessary and should be deleted. That provision, it was stated, created a double requirement for the application of the draft convention, which would be automatically excluded whenever one of the States involved was not a contracting State of the draft convention. It was further stated 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), the requirements resulting from subparagraph (a) would lead to the unacceptable 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 the parties to a contract were located in contracting States of the draft convention. 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. Strong support was expressed for that proposal, although the views differed as to whether both subparagraphs (b) and (c) might be deleted as well, or only one or the other of those provisions.

88. The countervailing view, which also obtained strong support, emphasized that the current wording was based on paragraph 1 (a) of article 1 of the United Nations Sales Convention and should be retained. The existing formulation had the advantage of allowing the parties to determine easily whether or not the draft convention would apply to their contract, without having first to ascertain which would be the applicable law of the contract. The possibly narrower geographic field of application offered by that option was compensated for by the advantage of the enhanced legal certainty provided by it.

89. At that juncture, the Working Group was reminded that the first version of the draft convention had contained a variant whereby the instrument would apply to communications exchanged between parties located in two different States, without requiring that both States should have ratified the draft convention (A/CN.9/WG.IV/WP.95, annex I). The Working Group, in its first reading of the draft convention, had not favoured that option because it was not parallel to article 1, paragraph 1 (a) of the United Nations Sales Convention (A/CN.9/509, para. 37). The need for such a parallelism between the two instruments, however, was stated to be no longer valid. That conclusion, it was explained, flowed logically from the Working Group's understanding, reached during its consideration of draft article Y (see para. 53, above), that the respective scopes of application of the draft convention and other international instruments were independent of one another.

90. The Working Group held an extensive discussion on the proposed amendment to the definition of the geographic scope of application of the draft convention. The Working Group eventually agreed to retain paragraph 1 (a) of draft article 1. However, the Working Group also agreed that, for future consideration, a revised version of the draft convention should contain, in an appropriate place, a provision authorizing a State to make a declaration that it would apply the provisions of the convention to exchanges of data messages in connection with international contracts whenever parties had their places of business in different States, even if only one of the States in question was a party to the draft Convention.

Paragraph 1 (b)

91. The suggestion was made that subparagraph (b) of paragraph 1 should be deleted, since the rule contained therein was not conducive to legal certainty. Subparagraph (b), it was stated, could lead to the application of the convention by virtue of the operation of rules of private international law, even though the forum State had not adopted the draft convention. It was suggested that if the parties elected to subject their exchanges of communications to the provisions of the draft convention, they had the possibility of doing so under subparagraph (c). The parties should not, however, be brought under the regime of the draft convention only because a third State applied the convention when they had not anticipated that result.

92. In response, it was suggested that subparagraph (b) reproduced a rule that was contained in the provisions on the sphere of application of other UNCITRAL instruments. The rule was stated to be useful to allow for an expanded geographic scope of application for the draft convention, since it did not require that the States where the parties to the contract were located had both to be contracting States of the convention. While there had been objections to that rule at an earlier session (A/CN.9/509, para. 38), the Working Group had thus far agreed to retain the subparagraph (A/CN.9/528, para. 42). For those States that might have difficulty applying subparagraph (b), it was possible to exclude its application by virtue of a declaration under draft article X, paragraph 1. The making of 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 an exclusionary declaration.

93. After the Working Group had noted the various views expressed and the fact that there was insufficient support for deleting the subparagraph, it was decided that the provision should be retained for future consideration.

Paragraph 1 (c)

94. It was pointed out that the possibility provided for in subparagraph (c) of paragraph 1 was also contemplated, for instance, in article 1, paragraph 2, of the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit.[3]

95. The question was asked as to whether subparagraph (c) contemplated an agreement to subject a contract to the laws of a given State or to incorporate the terms of the draft convention as such into the relevant contract. While the first situation was stated to be widely accepted in most legal systems, the second possibility might not always be possible. An international convention on private law matters only had legal effect for private parties to the extent that the convention in

question had been given effect domestically. Thus, choice-of-law clauses referring to an international convention were usually enforced as incorporation of foreign law, but not as enforcement of the international convention as such. Furthermore, the situation contemplated in the subparagraph would be particularly objectionable if it were to allow the parties to effectively violate mandatory rules of the governing law. The precedents of similar rules in other international conventions, it was further stated, were not entirely relevant, since, for instance, the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit[3] dealt with one particular type of contract, while the draft convention dealt with general issues that touched upon various areas of law.

96. In response, it was pointed out that disputes involving international contracts were not solved exclusively by State courts and that arbitration was a widespread practice in international trade. Arbitral tribunals, it was further stated, were often not specifically linked to any particular geographic location and often ruled on the disputes submitted to them on the basis of the law chosen by the parties. In practice, choice-of-law clauses did not always refer to the laws of particular States. Instead, there were often cases where the parties had chosen to subject their contracts to an international convention independently from the laws of any given jurisdiction. That the choice of an international convention to govern a contract was not dependent upon domestic law was evidenced by article 2, paragraph 1 (e) of the United Nations Convention on the Carriage of Goods by Sea,[9] which applied to a contract of carriage, inter alia, when a bill of lading stated that the provisions of the Convention or the legislation of any State giving effect to them were to govern the contract of carriage.

97. After the Working Group had noted the various views expressed and the fact that there was insufficient support for deleting subparagraph (c), it was decided that the provision should be retained for future consideration.

Article 2. Exclusions

98. The text of draft article 2 was as follows:

> "This Convention does not apply to the use of data messages [in connection with the following contracts, whether existing or contemplated] [in the context of the formation or performance of the following contracts]:
>
> "(a) Contracts concluded for personal, family or household purposes [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];
>
> "[(b) Contracts for the grant of limited use of intellectual property rights;]
>
> "(c) [*Other exclusions that the Working Group may decide to add*.] [Other matters identified by a Contracting State under a declaration made in accordance with article X]."

Chapeau

99. It was noted that the chapeau of draft article 2 contained alternative bracketed texts that the Working Group would have to consider at a later stage.

Subparagraph (a)

100. It was pointed out that the draft subparagraph excluded consumer contracts by using the same technique as that used in article 2, subparagraph (a), of the United Nations Sales Convention. However, the final part of that clause, namely, "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", was in square brackets in line with a suggestion to delete those words that had received some support at the forty-first session of the Working Group (A/CN.9/528, para. 52).

101. There was general agreement that it was very important to exclude consumer transactions from the draft convention as it contained a number of rules that were inappropriate in the context of consumer transactions. It was suggested that a rule such as that contained in draft article 10, paragraph 2, for example, which contained a rule that presumed receipt of a data message from the moment that it was capable of being retrieved by the addressee was inappropriate in the context of transactions involving consumers, as consumers could not be expected to check their e-mails regularly nor to be able to distinguish easily between legitimate commercial messages and spam mail. It was suggested that consumers should not be held to the same standards as persons engaged in commercial activities.

102. It was further pointed out that, in consumer transactions, the treatment of errors and the consequences of errors would typically require specific legal rules at a much higher level of detail than the general provisions contained in draft article 14. Another example of possible tension was that consumer protection rules typically contemplated an obligation for the vendor to make available to the consumer the contract terms in a manner accessible to the consumer. Furthermore, consumer protection rules relating to electronic transactions also specified the conditions under which standard contractual terms and conditions could be invoked against a consumer and when a consumer could be presumed to have expressed his or her consent to terms and conditions incorporated by reference into the contract. None of those issues was dealt with in the draft convention in a manner that would offer the degree of protection that consumers enjoyed in several legal systems. The Working Group agreed that consumers should be excluded from the reach of the draft convention.

103. It was suggested that the text contained in square brackets should be retained in order to retain consistency with, and offer the same level of legal certainty as provided by, the United Nations Sales Convention. It was pointed out that the corresponding provision in the United Nations Sales Convention had been considered important to ensure legal certainty and guard against placing the applicability of that Convention entirely on the seller's ability to ascertain the purpose for which the buyer had bought the goods.

104. The countervailing view, however, was that the bracketed text should be deleted, notwithstanding that it was drawn from the language used in the United Nations Sales Convention. It was suggested that it would be preferable if the exclusion of consumer contracts was not conditional upon the actual or presumed knowledge of the party offering the goods or services. It was observed that the corresponding clause in the United Nations Sales Convention was based on the premise that there could be situations where a sales contract might fall under the Convention despite the fact of it being entered into by a consumer (for an earlier discussion on this point, see A/CN.9/527, paras 83-89). It followed from those

provisions that the drafters of the United Nations Sales Convention assumed that there might be situations where a sales contract would fall under the Convention, despite the fact of it having been 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 noted, moreover, that, as indicated in the commentary on the draft of the United Nations Convention on Contracts for the International Sale of Goods, which had been prepared at the time by the Secretariat (A/CONF.97/5), 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".

105. It was further stated that, if a new instrument on electronic contracting should exclude consumer transactions, 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 Convention, such as the Internet, greatly increased the likelihood of consumers purchasing goods from sellers established abroad. An unconditional exclusion would instead provide sufficient comfort that consumer transactions would under no circumstances fall under the scope of application of the draft convention. Some support was expressed for the proposal to delete the bracketed text.

106. Following extensive discussion, it was agreed to revert to the matter once the Working Group had considered draft article 3, subparagraph (a) (see below, paras. 112-115).

Subparagraph (b)

107. It was recalled that the exclusion in subparagraph (b) that related to contracts for the grant of limited use of intellectual property rights was in square brackets as the Working Group had not yet reached an agreement on the matter (A/CN.9/527, paras. 90-93, and A/CN.9/528, paras. 55-60). The Working Group noted that the International Bureau of the World Intellectual Property Organization saw no need for an exclusion clause with regard to contracts involving intellectual property rights (A/CN.9/WG.IV/WP.106, para. 2). On that basis, the Working Group agreed to the deletion of the subparagraph.

Subparagraph (c)

Other exclusions

108. It was pointed out that draft subparagraph (c) provided two options in square brackets, the first being to provide a common list of exclusions and the second being to refer to declarations made under draft article X by each of the contracting States. A preference was generally expressed for the first option.

109. A number of matters were suggested for inclusion in the common list of exclusions. It was suggested that certain existing financial service markets should be included in a common list of exclusions under subparagraph (c). It was pointed out that, as stated at previous sessions of the Working Group (A/CN.9/527, para. 95, and A/CN.9/528, para. 61), the financial service sector was subject to well-defined regulatory and non-regulatory rules 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 X would be inadequate to reflect that reality. While support was expressed for the exclusion of that sector, concern was expressed that an exclusion relating to financial service markets might be too broad. In response, it was stated that what was being proposed was not a broad exclusion of financial services per se, but rather specific transactions such as payment systems, negotiable instruments, derivatives, swaps, repurchase agreements (repos), foreign exchange, securities and bond markets, and possibly general procurement activities of banks and loan activities (A/CN.9/527, para. 95, and A/CN.9/528, para. 61).

110. Another suggestion was that subparagraph (c) should exclude the following: contracts that created or transferred rights in real estate, except for rental rights; contracts requiring by law the involvement of courts, public authorities or professions exercising public authority; contracts of suretyship granted by and on collateral securities furnished by persons acting for purposes outside their trade, business or profession; and contracts governed by family law or by the law of succession (A/CN.9/WG.IV/WP.95, annex II). It was noted that the third of those matters, relating to contracts of suretyship, appeared to overlap with the proposal to include a more general exclusion for financial service markets. Yet another proposal was that subparagraph (c) might provide an alternative for excluding from the scope of the draft convention data messages exchanged in connection with contracts governed by certain existing international conventions. That approach might obviate the need for specific exclusions of those conventions by declarations made under draft article X, paragraph 2, or under article Y, paragraph 3. Possible categories for a common list of exclusions included negotiable instruments or documents relating to the carriage of goods.

111. It was decided that those proposals should be reflected in new provisions to be placed in square brackets for discussion at a future session of the Working Group.

Article 3. Matters not governed by this Convention

112. The text of draft article 3 was as follows:

> "This Convention does not affect or override any rule of law relating to:
>
> "[(a) The protection of consumers;]
>
> "(b) The validity of the contract or of any of its provisions or of any usage [except as otherwise provided in articles […]];
>
> "(c) The rights and obligations of the parties arising out of the contract or of any of its provisions or of any usage; or
>
> "(d) The effect which the contract may have on the ownership of rights created or transferred by the contract."

113. It was pointed out that, under subparagraph (a), consumer transactions would not be automatically excluded from the scope of the draft convention but that provisions of the draft convention would not supersede or affect rules on consumer protection. It was noted that, if the bracketed text in subparagraph (a) of draft article 2 were deleted, subparagraph (a) of draft article 3, which in some respects

represented an alternative to that subparagraph (A/CN.9/528, para. 52), could also be deleted.

114. However, it was suggested that, if the bracketed text from subparagraph (a) of draft article 2 were retained, it was possible that, in circumstances where the person offering the goods or services neither knew nor ought to have known that the transaction was a consumer transaction, that transaction would be covered by the draft convention. In the light of that possibility, it was stated that it was critical to retain subparagraph (a) of draft article 3 to preserve the operation of laws protecting consumers. In support of that, it was stated that subparagraph (a) should be retained to highlight the fact that the draft convention was not intended to upset consumer protection legislation.

115. Given the apparent connection between the bracketed text in subparagraph (a) of draft article 2 and subparagraph (a) of draft article 3, the Working Group considered the implications of subparagraph (a) of draft article 3.

116. It was noted that the purpose of the bracketed text in subparagraph (a) of draft article 2 was to provide legal certainty for the person providing goods or services who may not be able, in every situation, to ascertain whether or not the other party was or was not a consumer. It was stated that, in that case, subparagraph (a) of draft article 2 clarified that the provisions of the draft convention would apply when the personal or household purpose of a transaction was not apparent to the other party. However, it was stated that the benefit of that legal certainty was undermined by the fact that subparagraph (a) of draft article 3 deferred to consumer protection rules. A contrary view was that subparagraph (a) of draft article 3 was critical to protect consumers, given the implications of including the bracketed text in subparagraph (a) of draft article 2. In view of the evident conflict between the protection of the interests of both types of party, the Working Group concluded that the best way of ensuring legal certainty was to have a clear-cut exclusion in subparagraph (a) of draft article 2 by omitting the bracketed text therein. The Working Group agreed that subparagraph (a) of draft article 3 had thus become redundant and could therefore be deleted.

Subparagraphs (b), (c) and (d)

117. The Working Group took the view that, since the provisions of the draft convention did not cover the subject matter in subparagraphs (b), (c) and (d) of draft article 3, those subparagraphs were not necessary. In the light of that observation, the Working Group decided to delete subparagraphs (b), (c) and (d) in their entirety.

118. In the light of its deliberations on subparagraphs (a) to (d), the Working Group decided to delete the draft article.

Article 4. Party autonomy

119. The text of draft article 4 was as follows:

> "The parties may exclude the application of this Convention or derogate from or vary the effect of any of its provisions [except for the following: ...]."

120. The preference expressed by the Working Group was to have an unconditional application of party autonomy. In that regard, the Working Group agreed that the exceptions thereto within the square-bracketed text should be deleted. In that

connection, concern was expressed that the principle of party autonomy should not be understood as authorizing a party to derogate from mandatory form requirements under national laws or to lower the standards for functional equivalence set forth in draft article 9 of the draft convention.

121. In response, it was noted that the draft convention was only intended to provide functional equivalence in order to meet general form requirements and that it did not affect mandatory rules that required, for instance, the use of specific methods of authentication in a particular context. In any event, States remained free to make declarations in that respect under draft article X.

122. With respect to the general form requirements, the provisions in the draft convention were only facilitative in nature. The consequences of parties using a different method would simply be that they would not be able to meet the form requirements contemplated under draft article 9. It was recognized, however, that the matter might need to be considered in the context of draft article 9.

123. A suggestion was made that draft article 4 should also specify the manner in which parties could derogate from the draft convention. In particular, it was suggested that the draft article should clarify that derogation could occur either by explicit exclusion or, for instance, by contractual provision that was contrary to the draft provisions of the draft convention. Although some reservations relating to that proposal were expressed, the Working Group accepted that the proposal could be considered and that additional language to that effect could be included in square brackets.

124. It was noted that a study with respect to contractual practice in respect of derogations from the provisions of the United Nations Sales Convention might assist the Working Group in its deliberations on that matter.

Notes

[1] United Nations publication, Sales No. E.99.V.4.
[2] United Nations, *Treaty Series*, vol. 1489, No. 25567.
[3] General Assembly resolution 50/48, annex.
[4] United Nations, *Treaty Series*, vol. 1511, No. 26119.
[5] Ibid., No. 26121.
[6] *Official Records of the United Nations Conference on the Liability of Operators of Transport Terminals in International Trade, Vienna, 2-19 April 1991* (United Nations publication, Sales No. E.93.XI.3), part I, document A/CONF.152/13, annex.
[7] General Assembly resolution 56/81, annex.
[8] United Nations, *Treaty Series*, vol. 1155, No. 18232.
[9] Ibid., vol. 1695, No. 29215.