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Legal aspects of electronic commerce

Electronic contracting: provisions for a draft convention

Note by the Secretariat

1. The Working Group began its deliberations on electronic contracting at its thirty-ninth session (New York, 11-15 March 2002), when it considered a note by the Secretariat on selected issues relating to electronic contracting (A/CN.9/WG.IV/WP.95). That note also 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).

2. At that time, the Working Group held a general exchange of views on the form and scope of the instrument, but agreed to postpone discussion on exclusions from the draft convention until it had had an opportunity to consider the provisions related to the location of the parties and contract formation (see A/CN.9/509, paras. 18-40). The Working Group then took up articles 7 and 14, both of which dealt with issues related to the location of the parties (see A/CN.9/509, paras. 41-65). After it had completed its initial review of those provisions, the Working Group proceeded to consider the provisions dealing with contract formation in articles 8-13 (see A/CN.9/509, paras. 66-121). The Working Group concluded its deliberations on the draft convention at that session with a discussion of draft article 15 on availability of contract terms (see A/CN.9/509, paras. 122-125). The Working Group agreed, at that time, that it should consider articles 2-4, dealing with the sphere of application of the draft convention and articles 5 (Definitions) and 6 (Interpretation), at its fortieth session (see A/CN.9/509, para. 15).

3. The Working Group resumed its deliberations on the preliminary draft convention at its fortieth session (Vienna, 14-18 October 2002). The Working Group began its deliberations by a general discussion on the scope of the preliminary draft convention (see A/CN.9/527, paras. 72-81). The Working Group proceeded to

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consider articles 2-4, dealing with the sphere of application of the draft convention and articles 5 (Definitions) and 6 (Interpretation) (see A/CN.9/527, paras. 82-126).

4. The Secretariat thereafter prepared a revised version of the preliminary draft convention (A/CN.9/WG.IV/WP.100, annex I). The Working Group, at its forty-first session (New York, 5-9 May 2003), reviewed articles 1-11 of the revised preliminary draft convention (see A/CN.9/528, paras. 26-151). The Secretariat was requested to prepare a further revised version of the preliminary draft convention, for consideration by the Working Group at its forty-second session.

5. At its forty-second session (Vienna, 17-21 November 2003), the Working Group held a general discussion on the scope of the preliminary draft convention (see A/CN.9/546, paras. 33-38). The Working Group 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 considered the work being undertaken by that task force as a useful complement to the work being undertaken by the Working Group to develop an international convention. The Working Group proceeded to consider the revised text of the preliminary draft convention (A/CN.9/WG.IV/WP.103, annex I). The Working Group reviewed articles 8-15 and requested a number of changes in connection therewith (see A/CN.9/546, paras. 39-135).

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

Annex[1]

Preliminary draft convention[2] on the use of data messages in [international trade] [the context of international contracts]

CHAPTER I. SPHERE OF APPLICATION

Article 1. Scope of application

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[3]

(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[4]

(c) When the parties have agreed that it applies.[5]

Variant B[6]

… when these States are parties to this Convention and the data messages are used in connection with an existing or contemplated contract to which,

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[1] The numbers in square brackets after the article numbers indicate the corresponding numbers in the previous version of the draft convention (A/CN.9/WG.IV/WP.103, annex).

[2] The form of a convention represents a working assumption only (see A/CN.9/484, para. 124) and is without prejudice to a final decision by the Working Group as to the nature of the instrument.

[3] This variant reflects the scope of application of the draft convention essentially as contained in earlier versions. By combining this variant with variant A of draft article Y, a contracting State would make it clear that the provisions of the draft convention apply to messages exchanged under any of the international conventions referred to therein, while preserving the possibility of excluding particular instruments, or adding other instruments as it sees fit.

[4] This paragraph reproduces a rule that is contained in the provisions on the sphere of application of other UNCITRAL instruments. There have been objections to this rule on the grounds that such an expansion of the convention's field of application would significantly reduce certainty at the time of contracting owing to its inherent ex post facto nature (see A/CN.9/509, para. 38). At its forty-first session, the Working Group agreed to retain the subparagraph (see A/CN.9/528, para. 42). If the draft paragraph is retained, the Working Group would still need to consider whether reservations to this rule should be permitted, as was suggested at its forty-second session (see A/CN.9/528, para. 42). See also draft article X, paragraph 1.

[5] This possibility is provided, for instance, in article 1, paragraph 2, of the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit. The Working Group postponed a decision on this subparagraph until it had considered the operative provisions of the draft convention (see A/CN.9/528, paras. 43 and 44). The Working Group may wish to consider whether it should be possible for contracting States to exclude this provision through a declaration made pursuant to draft article X, paragraph 1.

[6] This variant reflects variant 1 of a proposal that was submitted by Germany to the Working Group at its forty-second session (A/CN.9/WG.IV/XLII/CRP.2). Its practical effect would be to limit the applicability of the draft convention only to messages exchanged under the above-mentioned conventions, with the possibility of individual exclusions by contracting States under variant C of draft article Y.

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) and Protocol thereto (Vienna, 11 April 1980)

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

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

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

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

2. 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.

Article 2. Exclusions[7]

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];[8]

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[7] The last version of this draft article contained two variants reflecting alternative approaches for the treatment of consumer contracts. Variant A excluded consumer contracts by using the same technique that is used in article 2, subparagraph (a), of the United Nations Convention on Contracts for the International Sale of Goods (the "United Nations Sales Convention"). Variant B deferred to domestic law on consumer protection issues, without excluding consumer transactions from the draft convention (see A/CN.9/527, para. 89; see also A/CN.9/528, paras. 51-54). The present version of the draft article retains only the former variant A. The former variant B has been incorporated into draft article 3, as its content is more akin to that article, in its current formulation. The Working Group may wish to bear in mind that the entire draft article may become redundant if the Working Group chooses to define the scope of application of the draft convention along the lines of variant C of draft article 1, since the draft convention would then apply only to the exchange of data messages falling within the scope of those international conventions in accordance with their own rules on their scope of application.

[8] The last phrase is in square brackets, since there was some support at the forty-first session of the Working Group to the suggestion that all the words after "household purposes" should be deleted (see A/CN.9/528, para. 52).

[(b) Contracts for the grant of limited use of intellectual property rights;][9]

(c) [*Other exclusions that the Working Group may decide to add.*][10] [Other matters identified by a Contracting State under a declaration made in accordance with article X].[11]

Article 3. Matters not governed by this Convention[12]

This Convention does not affect or override[13] any rule of law relating to:

[(a) The protection of consumers;][14]

(b) The validity of the contract or of any of its provisions or of any usage [except as otherwise provided in articles […]];[15]

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[9] This exclusion is in square brackets as the Working Group has not yet reached an agreement on the matter (see A/CN.9/527, paras. 90-93, and A/CN.9/528, paras. 55-60). The Working Group may wish to note that the International Bureau of the World Intellectual Property Organization sees no need for an exclusion clause with regard to contracts involving intellectual property rights (see A/CN.9/WG.IV/WP.106, para. 2).

[10] This draft article might contain additional exclusions, as may be decided by the Working Group. Annex II of the initial draft (A/CN.9/WG.IV/WP.95) reproduced, for illustrative purposes and without the intention of being exhaustive, exclusions typically found in domestic laws on electronic commerce. Additional exclusions that had been proposed at the fortieth session of the Working Group and reiterated at the forty-first session, related to certain existing financial services markets with well-established rules resulting from specific regulations, standard agreements and practices, system rules or otherwise. Those exclusions included payment systems, negotiable instruments, derivatives, swaps, repurchase agreements (repos), foreign exchange, securities and bond markets, while possibly including general procurement activities of banks and loan activities (see A/CN.9/527, para. 95, and A/CN.9/528, para. 61). Additional exclusions proposed at the forty-first session included "real estate transactions, as well as contracts involving courts or public authorities, family law and the law of succession" (see A/CN.9/528, para. 63). The Working Group may wish to note, in that connection, that the United Nations Commission on International Trade Law (UNCITRAL), at its thirty-sixth session, decided to undertake work in the area of public procurement, including procurement by electronic means (see A/58/17, paras. 225-230). This may render an open-ended exclusion of "contracts involving courts or public authorities" inappropriate.

[11] This phrase is an alternative formulation that would obviate the need for a common list of exclusions (see A/CN.9/527, para. 96).

[12] The Working Group may wish to bear in mind that the entire draft article may become redundant, if the Working Group chooses to define the scope of application of the draft convention along the lines of variant C of draft article 1, since the draft convention would then apply only to the exchange of data messages falling within the scope of those international conventions in accordance with their own rules on their field of application.

[13] This formulation has been used following a suggestion at the forty-first session of the Working Group that the words previously used ("This Convention is not concerned with") were inaccurate (see A/CN.9/528, para. 67).

[14] Draft subparagraph (a) appears within square brackets, as it represents in some respects an alternative to draft article 2, subparagraph (a) (see A/CN.9/528, para. 52). Under this rule, consumer transactions would not be automatically excluded from the scope of the draft convention, but the provisions of the draft convention would not supersede or affect rules on consumer protection.

[15] Draft subparagraph (b) is derived from article 4, subparagraph (a), of the United Nations Sales Convention. The Working Group may wish to consider the relationship between the general exclusions under the draft article and other provisions that, for instance, affirm the validity of data messages, such as draft articles 8, 9 and 12 (see A/CN.9/527, para. 103).

(c) The rights and obligations of the parties arising out of the contract or of any of its provisions or of any usage;[16] or

(d) The effect, which the contract may have on, the ownership of rights created or transferred by the contract.[17]

Article 4. Party autonomy

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: ...].[18]

CHAPTER II. GENERAL PROVISIONS

Article 5. Definitions[19]

For the purposes of this Convention:

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

(b) "Electronic data interchange (EDI)" means the electronic transfer from computer to computer of information using an agreed standard to structure the information;

(c) "Originator" of a data message means a person by whom, or on whose behalf, the data message purports to[20] have been sent or generated prior to storage, if any, but it does not include a person acting as an intermediary with respect to that data message;

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[16] The preliminary draft convention is not concerned with substantive issues arising out of the contract, which, for all other purposes, remains subject to its governing law (see A/CN.9/527, paras. 10-12). The Working Group may wish to consider whether this provision is still required, since the rule contained in the subparagraph might nevertheless be evident from the limited scope of the draft convention.

[17] Draft subparagraph (d) is based, mutatis mutandis, on article 4, subparagraph (b), of the United Nations Sales Convention. Regardless of its final decision on draft articles 1 and Y, the Working Group may wish to consider whether this provision is still required, since the rule contained in the subparagraph might nevertheless be evident from the limited scope of the draft convention.

[18] The Working Group has yet to consider whether some limitation to the principle of party autonomy is appropriate or desirable in the context of the preliminary draft convention, in particular in the light of provisions such as draft articles 9, paragraph 3, 11 and 15 (see A/CN.9/527, para. 109; see also A/CN.9/528, paras. 71-75). The earlier version of this article contained a second paragraph dealing with the agreement of the parties to the use of data messages in a contractual context. That provision has now been combined with draft article 8.

[19] The definitions contained in draft paragraphs (a) to (e) are derived from article 2 of the UNCITRAL Model Law on Electronic Commerce. The definition of "electronic signature" corresponds to the definition of the same expression in article 2 of the UNCITRAL Model Law on Electronic Signatures. The definitions of "offeror" and "offeree" have been deleted, although the Working Group had tentatively retained them (see A/CN.9/527, para. 115). The Secretariat submits that those words have become superfluous in view of the reformulation of draft articles 8 and 13 (see A/CN.9/528, para. 106).

[20] The wording of this definition is taken from article 2, subparagraph (c), of the UNCITRAL Model Law on Electronic Commerce. It has been suggested to the Secretariat that it might be preferable to delete the words "purports to have been sent" and use instead the words "has been sent".

(d) "Addressee" of a data message means a person who is intended by the originator to receive the data message, but does not include a person acting as an intermediary with respect to that data message;

(e) "Information system" means a system for generating, sending, receiving, storing or otherwise processing data messages; [21]

(f) "Automated information system" means a computer program or an electronic or other automated means used to initiate an action or respond to data messages or performances in whole or in part, without review or intervention by a natural person each time an action is initiated or a response is generated by the system;[22]

[(g) "Electronic signature" means data in electronic form in, affixed to, or logically associated with, a data message, which may be used to identify the person holding the signature creation data in relation to the data message and indicate that person's approval of the information contained in the data message;[23]

[(h) "Place of business"[24] means [any place of operations where a person carries out a non-transitory activity with human means and goods or services;][25] [the place where a party maintains a stable establishment to pursue an economic

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

[22] This definition is based on the definition of "electronic agent" contained in section 2, paragraph 6, of the Uniform Electronic Transactions Act of the United States of America; a similar definition is also used in section 19 of the Uniform Electronic Commerce Act of Canada. This definition was included in view of the contents of draft article 14.

[23] The initial draft contained in document A/CN.9/WG.IV/WP.95 included, as a variant to this provision, a general definition of "signature". Although the Working Group tentatively agreed on retaining both variants, the Secretariat suggests that it might be more appropriate, given the limited scope of the draft convention, to define only "electronic signatures", leaving a definition of "signature" for the otherwise applicable law, as had been suggested at the fortieth session of the Working Group (see A/CN.9/527, paras. 116-119).

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

[25] This alternative reflects the essential elements of the notions of "place of business", as understood in international commercial practice, and "establishment", as used in article 2, subparagraph (f), of the UNCITRAL Model Law on Cross-Border Insolvency.

activity other than the temporary provision of goods or services out of a specific location;][26]]

[(i) "Person" and "party" include natural persons and legal entities;][27]

[(j) Other definitions that the Working Group may wish to add.][28]

Article 6. Interpretation

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

2. Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable [by virtue of the rules of private international law].[29]

Article 7. Location of the parties[30]

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

2. If a person [has not indicated a place of business or, subject to paragraph 1 of this article, a person][31] has more than one place of business, the

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

[27] During the preparation of the UNCITRAL Model Law on Electronic Commerce, it was felt that such a definition did not belong in the text of the instrument, but in its guide to enactment. As a convention would not normally be accompanied by extensive comments, the proposed definition has been included in the form of a provision, should the Working Group find such a definition necessary, particularly in view of provisions such as draft article 9, variant B, sub-paragraph 4 (b).

[28] The Working Group may wish to consider whether definitions of other terms should be included, such as "signatory" (if variant B of draft article 10 (formerly 14) is adopted), "interactive applications", "electronic mail" or "domain name".

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

[30] The draft paragraph is not intended to create a new concept of "place of business" for the online world. The phrase in square brackets aims to prevent a party from benefiting from recklessly inaccurate or untruthful representations (see A/CN.9/509, para. 49), but not to limit the parties' ability to choose the Convention or otherwise agree on the applicable law. The two variants previously contained in the draft paragraph have been combined as the Working Group preferred the former variant A (see A/CN.9/528, para. 88). The words "manifest and clear" which the Working Group found to be conducive to legal uncertainty (see A/CN.9/528, para. 86), have been deleted.

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

place of business for the purposes of this Convention is that which has the closest relationship to the relevant contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract.

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

4. The place of location of the equipment and technology supporting an information system used by a person in connection with the formation of a contract or the place from which such information system may be accessed by other persons, in and of themselves, do not constitute a place of business [, unless such legal entity does not have a place of business [within the meaning of article 5 (h)]].[32]

5. The sole fact that a person makes use of a domain name or electronic mail address connected to a specific country does not create a presumption that its place of business is located in such country.[33]

Article 7 bis [*11*]. *Information requirements*

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

CHAPTER III. USE OF DATA MESSAGES IN INTERNATIONAL CONTRACTS

Article 8. Legal recognition of data messages

1. Where a communication, declaration, demand, notice or request that the parties are required to make or choose to make in connection with an existing or contemplated contract, including an offer and the acceptance of an offer, is conveyed by means of data messages, such communication, declaration, demand,

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[32] The draft paragraph reflects the principle that rules on location should not result in any given party being considered as having its place of business in one country when contracting electronically and in another country when contracting by more traditional means (see A/CN.9/484, para. 103). The draft paragraph follows the solution proposed in paragraph 19 of the preamble to Directive 2000/31/EC of the European Union (see also the overview of issues related to the location of information systems in A/CN.9/WG.IV/WP.104, paras. 9-17). The phrase within square brackets is only intended to deal with so-called "virtual companies" and not with natural persons, who are covered by the rule contained in draft paragraph 3. The Working Group may wish to consider whether draft paragraphs 4 and 5, which the Working Group agreed to retain for further consideration, should be combined in one provision (see A/CN.9/509, para. 59).

[33] The current system for assignment of domain names was not originally conceived in geographical terms. Therefore, the apparent connection between a domain name and a country is often insufficient to conclude that there is a genuine and permanent link between the domain name user and the country (see A/CN.9/509, paras. 44-46; see also A/CN.9/WG.IV/WP.104, paras. 18-20). However, in some countries the assignment of domain names is only made after verification of the accuracy of the information provided by the applicant, including its location in the country to which the relevant domain name relates. For those countries, it might be appropriate to rely, at least in part, on domain names for the purpose of article 7, contrary to what is suggested in the draft paragraph (see A/CN.9/509, para. 58). The Working Group may wish to consider whether the proposed rules should be expanded to deal with those situations.

notice or request shall not be denied validity or enforceability on the sole ground that data messages were used for that purpose.

[2. Nothing in this Convention requires a person to use or accept information in the form of data messages, but a person's agreement to use or accept information in the form of data messages may be inferred from the person's conduct.][34]

Article 9. Form requirements

[1. Nothing in this Convention requires a contract or any other communication, declaration, demand, notice or request that the parties are required to make or choose to make in connection with an existing or contemplated contract to be made or evidenced in any particular form.][35]

2. Where the law requires that a contract or any other communication, declaration, demand, notice or request that the parties are required to make or choose to make in connection with a contract should be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent reference.[36]

3. Where the law requires that a contract or any other communication, declaration, demand, notice or request that the parties are required to make or choose to make in connection with a contract should be signed, or provides consequences for the absence of a signature, that requirement is met in relation to a data message if:

(a) A method is used to identify that person and to indicate that person's approval of the information contained in the data message; and

(b) That method is as reliable as appropriate to the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.[37]

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

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

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

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

Article 10. Time and place of dispatch and receipt of data messages[38]

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

2. The time of receipt of a data message is the time when the data message becomes capable of being retrieved by the addressee or by any other person named by the addressee. A data message is presumed to be capable of being retrieved by the addressee when the data message enters an information system of the addressee unless it was unreasonable for the originator to have chosen that particular information system for sending the data message, having regard to the circumstances of the case and the content of the data message.

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

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

Article 11 [*12*]. *Invitations to make offers*[39]

A proposal to conclude a contract made through one or more data messages which is not addressed to one or more specific persons, but is generally accessible to parties making use of information systems, including proposals that make use of

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

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

interactive applications[40] for the placement of orders through such information system, is to be considered as an invitation to make offers, unless it clearly indicates the intention of the person making the proposal to be bound in case of acceptance.

Article 12 [*14*]. *Use of automated information systems for contract formation*[41]

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

[*Article 13* [*15*]. *Availability of contract terms*

[Variant A[42]

Nothing in this convention affects the application of any rule of law that may require a party that negotiates a contract through the exchange of data messages to make available to the other contracting party the data messages that contain the contractual terms in a particular manner, or relieves a party from the legal consequences of its failure to do so.]

[Variant B[43]

A party offering goods or services through an information system that is generally accessible to persons making use of information systems[44] shall

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

[41] This article has been redrafted as a non-discrimination rule, as requested by the Working Group at its forty-second session (see A/CN.9/546, paras. 128 and 129). The Working Group may wish to consider whether the provision should be supplemented by a general provision on attribution of data messages, including attribution of data messages exchanged by automated information systems (see A/CN.9/546, paras. 85, 86 and 125-127).

[42] This variant has been added pursuant to a request by the Working Group in view of the controversy around the draft article (see A/CN.9/546, paras. 130-135). If this variant alone is retained, the Working Group may wish to consider placing the draft article in chapter I or II of the draft convention or even combining it with the current draft article 3.

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

make the data message or messages which contain the contract terms[45] available to the other party [for a reasonable period of time] in a way that allows for its or their storage and reproduction.]

Article 14 [*16*]. *Error in electronic communications*

Variant A[46]

[Unless otherwise [expressly] agreed by the parties,][47] 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:[48]

(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

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

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

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

[47] The Working Group may wish to consider whether the possibility of derogation by agreement needs to be expressly made or can result from tacit agreement, for instance when a party proceeds to place an order through the seller's automated information system even though it is apparent to such party that the system does not provide an opportunity to correct input errors.

[48] This provision deals with the legal effects of errors made by a natural person communicating with an automated information system. The draft provision is inspired by section 22 of the Uniform Electronic Commerce Act of Canada. At the thirty-ninth session of the Working Group it was suggested that such provisions might not be appropriate in the context of commercial (that is, non-consumer) transactions, since the right to repudiate a contract in case of material error may not always be provided under general contract law. The Working Group nevertheless decided to retain it for further consideration (see A/CN.9/509, paras. 110 and 111).

[(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.][49]

Variant B

1. [Unless otherwise [expressly] agreed by the parties,][50] 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.[51]

[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.][52]

[*Other substantive provisions that the Working Group may wish to include.*] [53]

CHAPTER IV. FINAL PROVISIONS

[*Article X. Declarations on exclusions*[54]

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 subparagraph 1 (b) of article 1 of this Convention.] [55]

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[49] Subparagraphs (c) and (d) appear within square brackets since it was suggested, at the thirty-ninth session of the Working Group, that the matters dealt with therein went beyond matters of contract formation and departed from the consequences of avoidance of contracts under some legal systems (see A/CN.9/509, para. 110).

[50] See note 47.

[51] This variant combines in two paragraphs the various elements contained in paragraphs 2 and 3 and subparagraphs (a)-(d) of the first version of the draft article (see A/CN.9/WG.IV/WP.95), as requested by the Working Group (see A/CN.9/509, para. 111).

[52] See footnote 49.

[53] Such additional provisions might include, beyond consequences for a person's failure to comply with draft articles 11, 15 and 16, an issue that the Working Group has not yet considered (see A/CN.9/527, para. 103), other issues dealt with in electronic commerce legislation, such as liability of information services providers for loss or delay in the delivery of data messages.

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

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

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.]

Article Y. Communications exchanged under other international conventions[56]

Variant A[57]

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][58] undertakes to apply the provisions of [article 7 and] chapter III[59] 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) and Protocol thereto (Vienna, 11 April 1980)

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

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[56] The draft article is intended to offer a possible common solution for some of the legal obstacles to electronic commerce under existing international instruments, which had been the object of a survey contained in an earlier note by the Secretariat (see A/CN.9/WG.IV/WP.94). At the fortieth session of the Working Group, there was general agreement to proceed in that manner, to the extent that the issues were common, which was the case at least with regard to most issues raised under the instruments listed in variant A (see A/CN.9/527, paras. 33-48). If either variant B or variant C is adopted, the title of the draft article would need to be changed to "reservations".

[57] This variant is intended to remove doubts as to the relationship between the rules contained in the draft convention and rules contained in other international conventions. It is not the purpose of this variant effectively to 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 conduct their transactions through electronic means.

[58] The language in square brackets is intended to give more flexibility in the application of the draft article, since, without such clarification, the provision might be read to the effect that an undertaking pursuant to the draft article needed to be assumed upon signature, ratification or accession and could not be expanded at a later stage. If these words are retained, a provision along the lines of paragraph 3 of draft article X may be needed also in draft article Y.

[59] The specific reference to the substantive provisions of the draft convention contained in chapter III is intended to avoid the impression that the provisions on the scope of application of the draft convention would affect the definition of the scope of application of other international conventions. The Working Group may wish to consider whether the provisions of draft article 7, to which reference is made in square brackets, are also suitable for subsidiary (interpretative) application in the context of other international conventions, or whether they might interfere with the existing interpretation of those conventions.

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

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

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

[2. Any State may declare 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.][60]

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[61]

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.

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

[61] This variant reflects variant 2 of a proposal that was submitted by Germany at the forty-second session of the Working Group (see A/CN.9/WG.IV/XLII/CRP.2). It is 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[62]

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.

[*Customary and other final clauses that the Working Group may wish to include.*]

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[62] This variant reflects variant 1 of a proposal that was submitted by Germany at the forty-second session of the Working Group (see A/CN.9/WG.IV/XLII/CRP.2). It is included in the event that the Working Group chooses variant B of draft article 1, so as to give the contracting States the possibility to exclude the application of the draft convention in respect of certain specific conventions.