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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, held in New York from 11 to 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). The Working Group further considered a note by the Secretariat transmitting comments that had been formulated by an ad hoc expert group established by the International Chamber of Commerce to examine the issues raised in document A/CN.9/WG.IV/WP.95 and the draft provisions set out in its annex I (A/CN.9/WG.IV/WP.96).

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 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 (A/CN.9/509, paras. 41-65). After it had completed its initial review of those provisions, the Working Group proceeded to consider the provisions dealing with contract formation in articles 8-13 (A/CN.9/509, paras. 66-121). The Working Group concluded its deliberations on the draft convention at that session with a discussion of draft article 15 on availability of contract terms (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 (A/CN.9/509, para. 15).

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3. The Working Group resumed its deliberations on the preliminary draft convention at its fortieth session, held in Vienna from 14 to 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 consider articles 2-4, dealing with the sphere of application of the draft convention and articles 5 (definitions) and 6 (interpretation) (A/CN.9/527, paras. 82-126). The Working Group requested the Secretariat to prepare a revised text of the preliminary draft convention for consideration by the Working Group at its forty-first session.
4. The annex to this note contains the revised version of the preliminary draft convention, which reflects the deliberations and decisions of the Working Group at its thirty-ninth and fortieth sessions.

Annex I

Preliminary draft convention¹ on [international] contracts concluded or evidenced by data messages

Chapter I. Sphere of application

Article 1

Scope of application²

1. This Convention applies to [any kind of information in the form of data messages that is used] [the use of data messages] in the context of [transactions] [contracts] between parties whose places of business are different States:

(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]; or³

(c) When the parties have agreed that it applies.⁴

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 [transaction] [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 [transaction] [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.

¹ The draft instrument has been prepared in the form of a convention in accordance with the working assumption agreed to at the thirty-eighth session of the Working Group (A/CN.9/484, para. 124) and without prejudice to a final decision by the Working Group as to the nature of the instrument.

² This provision reflects essentially the scope of application of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980, "The United Nations Sales Convention"), as set out in its article 1.

³ The phrase "when the rules of private international law lead to the application of the law of a Contracting State" in paragraph 3 reproduces a rule that is contained in the provisions on the sphere of application of other United Nations Commission on Trade Law (UNCITRAL) instruments. Although it was suggested that the phrase should be deleted, the Working Group, at its thirty-ninth session, decided to retain it for further consideration (A/CN.9/509, para. 38).

⁴ 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. However, the Working Group may wish to consider whether, in the context of the preliminary draft convention, it would be appropriate to offer the parties such a right even in the absence of other connecting factors.

Article 2
Exclusions

Variant A

This Convention does not apply to [transactions relating to] 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;⁵

(b) [Contracts granting] limited use of intellectual property rights;⁶

(c) [*Other exclusions, such as real estate transactions, that could be added by the Working Group.*] [Other matters identified by a Contracting State under a declaration made in accordance with article X].⁷

Variant B

1. This Convention does not apply to [transactions relating to] the following [contracts]:

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

(b) [*Other exclusions, such as real estate transactions, that could be added by the Working Group.*] [Other matters identified by a Contracting State under a declaration made in accordance with article X].

2. This Convention does not override any rule of law intended for the protection of consumers.⁸

⁵ This provision follows an exclusion contained in article 2, subparagraph (a) of the United Nations Sales Convention, and in most instruments prepared by UNCITRAL. It reflects the initial understanding of the Working Group that the future instrument should not focus on consumer transactions (A/CN.9/527, paras. 83-89).

⁶ This exclusion reflects the initial understanding of the Working Group that licensing contracts should be distinguished from other commercial transactions and might need to be excluded from the draft convention (A/CN.9/527, paras. 90-93).

⁷ This draft article might contain additional exclusions, as may be decided by the Working Group. With a view to facilitating the consideration of this issue 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. Other exclusions proposed at the Working Group's fortieth session include the following: contracts creating rights in real estate, contracts involving courts or public authorities, suretyship, family law or the law of succession; 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 (A/CN.9/527, para. 95). The second phrase in square brackets in this subparagraph is an alternative formulation that would obviate the need for a common list of exclusions (A/CN.9/527, para. 96).

⁸ Paragraph 2 of variant B has been included as an alternative to subparagraph (a) of variant A following a suggestion made at the Working Group's fortieth session (see A/CN.9/527, para. 89).

*Article 3**Matters not governed by this Convention*

This Convention is not concerned with:

- (a) The validity of the [transaction] [contract] or of any of its provisions or of any usage [except as otherwise provided in articles [...]];⁹
- (b) The rights and obligations of the parties arising out of the [transaction] [contract] or of any of its provisions or of any usage;¹⁰
- (c) The effect which the [transaction] [contract] may have on the ownership of rights created or transferred by the [transaction] [contract].¹¹

*Article 4**Party autonomy*

1. 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: ...].¹²
- [2. Nothing in this Convention requires a person to use or accept [information in electronic form] [data messages], but a person's consent to do so may be inferred from the person's conduct.]¹³

Chapter II. General provisions*Article 5**Definitions*¹⁴

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;

⁹ Draft subparagraphs (a) and (c) are derived from article 3 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 (see A/CN.9/527, para. 103).

¹⁰ This provision has been included so as to make it clear that 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).

¹¹ Draft subparagraph (c) was based, *mutatis mutandis*, on article 4, subparagraph (b), of the United Nations Sales Convention.

¹² Draft article 4 reflects the general principle of party autonomy, as recognized in several UNCITRAL instruments. The Working Group may wish to consider, however, whether some limitation to this principle might be appropriate or desirable in the context of the preliminary draft convention, in particular in the light of provisions such as draft articles 13, paragraphs 2 and 15 (see A/CN.9/527, para. 109).

¹³ The provision reflects the idea that parties should not be forced to accept contractual offers or acts of acceptance by electronic means if they did not want to do so (A/CN.9/527, para. 108).

¹⁴ The definitions contained in draft paragraphs (a) to (d) and (f) are derived from article 2 of the UNCITRAL Model Law on Electronic Commerce.

(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 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;

(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;

(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;¹⁵

(g) “Offeror” means a natural person or legal entity that offers goods or services;¹⁶

(h) “Offeree” means a natural person or legal entity that receives or retrieves an offer of goods or services;

[(i) “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;¹⁷

[(j) “Place of business”¹⁸ means ...

¹⁵ This definition is based on the definition of “electronic agent” contained in section 2 (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 provisions of draft article 12.

¹⁶ The proposed definitions of “offeror” and “offeree” (draft subparagraphs (g) and (h), respectively) have been included in view of the fact that those expressions are used in draft articles 8 and 9, in a context in which they might not easily be replaced with the words “originator” or “addressee”.

¹⁷ This provision reproduces the definition of electronic signature contained in article 2 (a) of the UNCITRAL Model Law on Electronic Signatures. 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 Working Group’s fortieth session (see A/CN.9/527, paras. 116-119).

¹⁸ The proposed definition appears within square brackets in view of the fact that, although having repeatedly used the concept of “place of business” in its various instruments, the Commission has not thus far defined that concept (see A/CN.9/527, paras. 120-122). At the Working Group’s thirty-ninth session, it was suggested that the rules on parties’ location should be expanded to include elements such as the place of an entity’s organization or incorporation (A/CN.9/509,

Variant A¹⁹

... any place of operations where a person carries out a non-transitory activity with human means and goods or services;]

Variant B²⁰

... the place where a party pursues an economic activity through a stable establishment for an indefinite period;]

[(k) “Person” and “party” include natural persons and legal entities;]²¹

[(l) “Transaction” means an action or set of actions occurring between two or more persons relating to the conduct of business, commercial or governmental affairs;]²²

[(m) Other definitions that the Working Group may wish to add.]²³

para. 53). The Working Group decided that it could consider the desirability of using supplementary elements to the criteria used to define the parties’ location by expanding the definition of place of business (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 further 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 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.

¹⁹ Variant A 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.

²⁰ Variant B follows the understanding of this expression within the European Union (see paragraph 19 of the preamble to Directive 2000/31/EC of the European Union). The words “indefinite period” are meant to exclude only the temporary provision of goods or services out of a specific location, without requiring, however, that the company providing those goods or services be established indefinitely at that place.

²¹ This definition is offered to make it clear that when using the words “person” or “party” without further qualification, the preliminary draft convention is referring to both natural persons and legal entities. The Working Group may wish to note that, 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.

²² The Working Group may find it desirable to include a definition of “transaction” in the event that the word is used in article 1 and elsewhere, in view of the varying meaning of the word “transaction” in various legal systems (A/CN.9/527, para. 101). The proposed definition is drawn from section 2, paragraph 16 of the Uniform Electronic Transactions Act of the United States.

²³ The Working Group may wish to consider the need for or desirability of including definitions for other terms used in the preliminary draft convention, such as “signatory” (if variant B of draft article 14 (Form requirements) is adopted), “Internet”, “web site” and “domain name”.

Article 6
*Interpretation*²⁴

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].²⁵

Article 7
*Location of the parties*²⁶

1. For the purposes of this Convention, a party is presumed to have its place of business at the geographic location indicated by it [in accordance with article 15] [, unless it is manifest and clear that ...

Variant A

... the party does not have a place of business at such location].

Variant B

... the party does not have a place of business at such location [[and] [or] that such indication is made solely to trigger or avoid the application of this Convention]].

2. If a party has more than one place of business, the place of business for the purposes of this Convention is that which has the closest relationship to the relevant [transaction] [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 [transaction] [contract].²⁷

²⁴ This draft article mirrors article 7 of the United Nations Sales Convention and similar provisions in other UNCITRAL instruments.

²⁵ 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 (A/CN.9/527, paras. 125 and 126).

²⁶ Draft article 7 is one of the central provisions in the preliminary draft convention and one which might be essential, if the sphere of application of the preliminary draft convention is defined along the lines of variant A of draft article 1. Draft paragraph 1 builds upon a proposal that was made at the thirty-eighth session of the Working Group, to the effect that the parties in electronic transactions should have the duty to disclose their places of business (A/CN.9/484, para. 103). That duty is reflected in draft article 15, paragraph 1, subparagraph (b). The draft provision is not intended to create a new concept of "place of business" for the online world. The phrase in square brackets in variant B aims to prevent a party from benefiting from recklessly inaccurate or untruthful representations (A/CN.9/527, para. 49), but not to limit the parties' ability to choose the Convention or otherwise agree on the applicable law.

²⁷ Draft paragraphs 2 and 3 reflect traditional rules applied to determine a party's place of business (see, for instance, United Nations Sales Convention, art. 10).

3. If a natural 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 legal entity for the conclusion of a contract or the place from which such information system may be accessed by other persons, in and of themselves, does not constitute a place of business [, unless such legal entity does not have a place of business [within the meaning of article 5 (j)]].²⁸

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.²⁹

Chapter III. Use of data messages in international [transactions] [contracts]

Article 8

*Use of data messages in contract formation*³⁰

1. Unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by means of data messages [or other actions communicated

²⁸ This draft paragraph proposes a rule specifically concerned with issues raised by the use of electronic means of communication in contract formation. The draft paragraph is intended to reflect an opinion shared by many delegations participating at the thirty-eighth session of the Working Group that, when dealing with the location of the parties, the Working Group should take care to avoid devising rules that would result in any given party being considered as having its place of business in one country when contracting electronically and in another country when contracting by more traditional means (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. The phrase within square brackets is intended to deal only 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 (A/CN.9/509, para. 59).

²⁹ This draft paragraph takes into account the fact that the current system for assignment of domain names was not originally conceived in geographical terms and that, 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 (A/CN.9/509, paras. 44-46). However, at the Working Group's thirty-ninth session, it was said that in some countries the assignment of domain names was only made after verification of the accuracy of the information provided by the applicant, including its location in the country to which the relevant domain name related. For those countries, it might be appropriate to rely, at least in part, on domain names for the purpose of article 7, contrary to what was suggested in the draft paragraph (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.

³⁰ The draft article, which was previously numbered article 10, replaces the entirety of former draft article 8, except for its paragraphs 2 and 3, which have been combined in the new paragraph 2, as requested by the Working Group at its thirty-ninth session (A/CN.9/509, paras. 67-73). The provisions of paragraph 1 are based on article 11, paragraph 1, of the UNCITRAL Model Law on Electronic Commerce.

electronically in a manner that is intended to express the offer or acceptance of the offer].³¹

2. When expressed in the form of a data message, an offer and the acceptance of an offer become effective when they are received by [the addressee] [the offeree or the offeror, as appropriate].³²

3. Where data messages are used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that data messages were used for that purpose.

Article 9
Invitations to make offers

1. A data message containing a proposal to conclude a contract that is not addressed to one or more specific persons, but is generally accessible to persons making use of information systems, such as the offer of goods and services through an Internet web site, is to be regarded merely as an invitation to make offers, unless it indicates the intention of the offeror to be bound in case of acceptance.³³

2. Unless otherwise indicated by the offeror, the offer of goods or services through [automated computer systems] [using an interactive application that appears to allow for the contract to be concluded automatically]³⁴ ...

³¹ The phrase “or other actions communicated electronically”, which is derived from section 20, paragraph 1, subparagraph (b) of the Uniform Electronic Commerce Act of Canada, are intended to clarify rather than expand the scope of the rule contained in the Model Law. They appear within square brackets, however, in the event that the Working Group finds that such additional clarification is not needed, as was suggested at its thirty-ninth session (A/CN.9/509, para. 89).

³² The rules in this paragraph, which appeared in the former draft article 8, reflect the essence of the rules on contract formation contained, respectively, in articles 15, paragraph 1, and 18, paragraph 2, of the United Nations Sales Convention. The verb “reach”, which is used in the United Nations Sales Convention, has been replaced with the verb “receive” in the draft article so as to align it with draft article 11, which is based on article 15 of the UNCITRAL Model Law on Electronic Commerce.

³³ This provision, which is inspired by article 14, paragraph 1, of the United Nations Sales Convention, is intended to clarify an issue that has raised a considerable amount of discussion since the advent of the Internet. The proposed rule results from an analogy between offers made by electronic means and offers made through more traditional means (see A/CN.9/509, paras. 76-85).

³⁴ Paragraph 2 offers criteria for determining a party’s intention to be bound in case of acceptance. The first sentence is based on the general rule on interpretation of a party’s consent, which is contained in paragraph 3 of article 8 of the United Nations Sales Convention. At the Working Group’s thirty-ninth session, it was said that the party placing an order might have no means of ascertaining how the order would be processed and whether it was in fact dealing with “automated computer systems allowing the contract to be concluded automatically” or whether other actions, by human intervention or through the use of other equipment, might be required in order effectively to conclude a contract or process an order. The original formulation in the draft paragraph was further criticized because the words “allowing the contract to be concluded automatically”, which appeared to assume that a valid contract had been concluded, were felt to be misleading in a context dealing with actions that might lead to contract formation (A/CN.9/509, para. 82). The Working Group may wish to consider whether the alternative formulation proposed in the second set of square brackets, which places emphasis on the reliance by the offeree, adequately address those concerns.

Variant A

... is presumed to indicate the intention of the offeror to be bound in case of acceptance.³⁵

Variant B

... does not, in and of itself, constitute evidence of the offeror's intention to be bound in case of acceptance.³⁶

Article 10

*Other uses of data messages in international [transactions]
[in connection with international contracts]*³⁷

1. Unless otherwise agreed by the parties, any communication, declaration, demand, notice or request that the parties are required to make or may wish to make in connection with a [transaction] [contract] falling within the scope of this Convention may be expressed by means of data messages [or other actions communicated electronically in a manner that is intended to express the offer or acceptance of the offer].

2. Where data messages are used for communication, declaration, demand, notice or request in accordance with this article, such communication, declaration, demand, notice or request shall not be denied validity or enforceability on the sole ground that data messages were used for that purpose.

[3. The provisions of this article do not apply to the following: ...] [The provisions of this article do not apply to those matters identified by a Contracting State under a declaration made in accordance with article X.]³⁸

³⁵ The rule proposed in variant A is similar to the rule proposed in legal writings for the functioning of automatic vending machines (see A/CN.9/WG.I/WP.95, para. 54).

³⁶ At the Working Group's thirty-ninth session, it was pointed out that entities offering goods or services through a web site that used interactive applications enabling negotiation and immediate processing of purchase orders for goods or services frequently indicated in their web sites that they were not bound by those offers. If that already was the case in practice, it would be questionable for the Working Group to reverse that situation in the draft provision (A/CN.9/509, para. 82). Variant A reflects that proposition and treats offers of goods or services, even where an "automated computer system" is used, as an invitation to make offers. An alternative approach to that end might be to combine paragraphs 1 and 2 in a single provision, as had been suggested at the Working Group's thirty-ninth session (A/CN.9/509, para. 84) along the following lines:

"A proposal for concluding a contract that is not addressed to one or more specific persons, but is generally accessible to persons making use of information systems, such as the offer of goods and services through an Internet web site, including offers using [automated computer systems] [interactive applications that appear to allow for the contract to be concluded automatically] is to be considered merely as an invitation to make offers, unless it indicates the intention of the offeror to be bound in case of acceptance."

³⁷ The rules contained in this draft article are based on article 11, paragraph 1, of the UNCITRAL Model Law on Electronic Commerce. See also footnote 31 for explanations on the phrase "or other actions communicated electronically".

³⁸ Given the broad scope of the draft convention, which now covers all electronic communications and not only contract formation, the Working Group may wish to consider whether additional

Article 11
*Time and place of dispatch and receipt of data messages*³⁹

Variant A

1. Unless otherwise agreed by the parties, the dispatch of a data message occurs when it enters an information system outside the control of the originator or of the person who sent the data message on behalf of the originator.

2. Unless otherwise agreed by the parties, if the addressee has designated an information system for the purpose of receiving data messages, the data message is deemed to be received at the time when it enters the designated information system; if the data message is sent to an information system of the addressee that is not the designated information system, the data message is deemed to be received at the time when the data message is retrieved by the addressee. If the addressee has not designated an information system, receipt occurs when the data message enters an information system of the addressee.⁴⁰

3. 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 5 of this article.

4. Unless otherwise agreed by the parties, when the originator and the addressee use the same information system, both the dispatch and the receipt of a data message occur when the data message becomes capable of being retrieved and processed by the addressee.⁴¹

5. Unless otherwise agreed between the originator and the addressee, 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.

specific exclusions would be needed.

³⁹ Except for draft paragraph 4, the rules contained in this draft article are based on 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, which follows more closely the style of the United Nations Sales Convention.

⁴⁰ Draft paragraph 2 of variant A does not add further requirements to those set forth in article 15, paragraph 2, of the Model Law, unlike some domestic legislative texts based on the Model Law that generally require that a message should in all cases be “in a form capable of being retrieved and processed by [the addressee’s] system” (Uniform Electronic Transactions Act of the United States, section 15 (b) (1) (2)), or “capable of being retrieved and processed by the addressee” (Uniform Electronic Commerce Act of Canada, section 23 (1)), and not only when both parties use the same system.

⁴¹ This draft paragraph deals with cases where both the originator and the addressee use the same communication system. In such a case, the criterion used in draft paragraph 1 cannot be used, since the message remains in a system that cannot be said to be “outside the control of the originator”. The rule proposed in the draft paragraph treats dispatch and receipt of a data message as being simultaneous when the message “becomes capable of being retrieved and processed by the addressee”. This situation was not contemplated by article 15, paragraph 1, of the Model Law. It is submitted, however, that the proposed special rule, which is inspired by section 23 (1) (a) of the Uniform Electronic Commerce Act of Canada, does not conflict with the rules contained in article 15 of the Model Law.

Variant B

1. Unless otherwise agreed by the parties, the dispatch of a data message occurs when it enters an information system outside the control of the originator or of the person who sent the data message on behalf of the originator.
2. Unless otherwise agreed by the parties, the data message is deemed to be received at the time when the message is capable of being retrieved and processed by the addressee.⁴²

Article 12
Automated transactions

Unless otherwise agreed by the parties, a contract may be formed by the interaction of an automated information system and a person or by the interaction of automated information systems, even if no person reviewed each of the individual actions carried out by such systems or the resulting agreement.⁴³

Article 13
Error in electronic communications

Variant A

1. Unless otherwise [expressly] agreed by the parties, a party offering goods or services through an automated information system shall make available to the parties that use the system technical means allowing the parties to identify and correct errors [in data messages exchanged through the information system] [prior to the conclusion of a contract]. [The technical means to be made available pursuant to this paragraph shall be appropriate, effective and accessible.]⁴⁴

⁴² At the Working Group's thirty-ninth session it was suggested that paragraph 2, and possibly paragraphs 3-5, should be replaced with a shorter provision to the effect that a data message was deemed to be received if the message was capable of being retrieved and processed by the addressee, as contemplated in draft paragraph 4 of variant A. The Working Group may wish to consider whether transforming such a special provision into the general rule for dispatch and receipt would not create a duality of regimes for electronic and paper-based transactions, at least in respect of sales contracts. Under article 24 of the United Nations Sales Convention, a notice "reaches" the addressee, inter alia, when it is "delivered" to his or her mailing address. The Working Group may wish to consider whether requiring that a message must be "capable of being retrieved and processed" goes beyond the notion of availability which seems to inspire article 24 of the United Nations Sales Convention.

⁴³ This draft provision, which the Working Group, at its thirty-ninth session, decided to retain in substance (A/CN.9/509, para. 103), develops further a principle formulated in general terms in article 13, paragraph 2, subparagraph (b) of the UNCITRAL Model Law on Electronic Commerce. The draft article does not innovate on the current understanding of legal effects of automated transactions, as expressed by the Working Group, that a contract resulting from the interaction of a computer with another computer or person is attributable to the person in whose name the contract is entered into (A/CN.9/484, para. 106).

⁴⁴ This draft paragraph deals with the issue of errors in automated transactions (see A/CN.9/WG.IV/WP.95, paras. 74-79). The rule contained in the draft paragraph, which is inspired in article 11, paragraph 2, of Directive 2000/31/EC of the European Union, creates an obligation for persons offering goods or services through automated computer systems, to offer

2. A contract concluded by a person that accesses an automated information system of another person has no legal effect and is not enforceable if the person made an error in a data message and:⁴⁵

(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 person 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 person'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 person.]⁴⁶

Variant B

1. A contract concluded by a person that accesses an automated information system of another person has no legal effect and is not enforceable if the person made an error in a data message and the automated computer system did not provide the person with an opportunity to prevent or correct the error, provided that the person invoking the error notifies the other person of the error as soon as practicable and indicates that he or she made an error in the data message.⁴⁷

[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 person's instructions, to return the goods or services

means for correcting input errors. 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 computer system even though it is apparent to such party that the system does not provide an opportunity to correct input errors.

⁴⁵ Draft paragraph 2 deals with the legal effects of errors made by a natural person communicating with an automated computer system. The draft provision is inspired by section 22 of the Uniform Electronic Commerce Act of Canada. At the Working Group's thirty-ninth session it was suggested that the 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 (A/CN.9/509, paras. 110 and 111).

⁴⁶ Subparagraphs (c) and (d) appear within square brackets since it was suggested, at the Working Group's thirty-ninth session, 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 (A/CN.9/509, para. 110).

⁴⁷ This variant combines in two paragraphs the various elements contained in paragraphs 2 and 3 and subparagraphs (a)-(d) of the previous version of the draft article, as was requested by the Working Group (A/CN.9/509, para. 111). In order to focus on contract law matters, paragraph 1 of variant A has not been reproduced in variant B, following suggestions at the Working Group's thirty-ninth session, that the language in paragraph 2 of the former draft article 12 was of a regulatory nature (A/CN.9/509, para. 108).

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 person.]⁴⁸

Article 14
*Form requirements*⁴⁹

1. Nothing in this Convention requires a [transaction] [contract] or any other communication, declaration, demand, notice or request that the parties are required to make or may wish to make in connection with a [transaction] [contract] falling within the scope of this Convention to be concluded or evidenced in [a particular form, including written form] [by data messages, writing or any other form] or subjects a [transaction] [contract] to any other requirement as to form.]⁵⁰

2. Where the law requires that a [transaction] [contract] or any other communication, declaration, demand, notice or request that the parties are required to make or may wish to make in connection with a [transaction] [contract] falling within the scope of this Convention 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.⁵¹

3. Where the law requires that a [transaction] [contract] or any other communication, declaration, demand, notice or request that the parties are required to make or may wish to make in connection with a [transaction] [contract] falling within the scope of this Convention should be signed, or provides consequences for the absence of a signature, that requirement is met in relation to a data message if:

Variant A⁵²

(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.

⁴⁸ See footnote 45.

⁴⁹ This draft article combines essential provisions on form requirements of the United Nations Sales Convention (art. 11) with the provisions of articles 6 and 7 of the UNCITRAL Model Law on Electronic Commerce.

⁵⁰ This provision transposes to the context of the draft convention the general principle of freedom of form contained in article 11 of the United Nations Sales Convention, in the manner suggested at the Working Group's thirty-ninth session (A/CN.9/509, para. 115).

⁵¹ 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).

⁵² Variant A recites the general criteria for the functional equivalence between handwritten signatures and electronic identification methods referred to in article 7 of the UNCITRAL Model Law on Electronic Commerce

Variant B⁵³

... an electronic signature is used which 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.

4. An electronic signature is considered to be reliable for the purposes of satisfying the requirements referred to in paragraph 3 of this article if:

(a) The signature creation data are, within the context in which they are used, linked to the signatory and to no other person;

(b) The signature creation data were, at the time of signing, under the control of the signatory and of no other person;

(c) Any alteration to the electronic signature, made after the time of signing, is detectable; and

(d) Where the purpose of the legal requirement for a signature is to provide assurances as to the integrity of the information to which it relates, any alteration made to that information after the time of signing is detectable.

5. Paragraph 4 of this article does not limit the ability of any person:

(a) To establish in any other way, for the purposes of satisfying the requirement referred to in paragraph 3 of this article, the reliability of an electronic signature;

(b) To adduce evidence of the non-reliability of an electronic signature.

[Article 15

*General information to be provided by the parties*⁵⁴

1. A party that uses data messages to advertise or offer goods or services⁵⁵ shall render the following information available [in the data message or by appropriate reference therein]:⁵⁶

⁵³ Variant B is based on article 6, paragraph 3, of the draft UNCITRAL Model Law on Electronic Signatures.

⁵⁴ This draft article is intended to enhance certainty and clarity in international transactions by ensuring that a party offering goods or services through open networks, such as the Internet, should offer some minimum information on its identity, legal status, location and address. The draft article, which is inspired by article 5, paragraph 1, 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 (A/CN.9/509, paras. 61-65). In its current form, the draft article does not contemplate any sanctions or consequences for a party's failure to provide the required information, a matter that still needs to be considered by the Working Group (see A/CN.9/509, para. 123, and A/CN.9/527, para. 103).

⁵⁵ The phrase "through an information system generally accessible to the public" has been deleted, as the Working Group felt that the obligations contemplated in the draft article, if retained, should apply regardless of the medium used by the parties (A/CN.9/509, paras. 46 and 65).

⁵⁶ The Working Group may wish to consider the desirability of specifying in the provision how the information is to be made "available", in particular whether the information also needs to be capable of being retrieved or stored by the addressee.

(a) Its name and, for legal entities, its full corporate name and place of incorporation;⁵⁷

(b) The geographic location and address at which it has its place of business;

(c) Its contact details, including its electronic mail address.

2. A party offering goods or services through an information system that is generally accessible to the public shall ensure that the information required to be provided under paragraph 1 of this article is easily, directly and permanently accessible to parties accessing the information system.]

[*Article 16*

*Availability of contract terms*⁵⁸

A party offering goods or services through an information system that is generally accessible to the public⁵⁹ shall make the data message or messages which contain the contract terms⁶⁰ available to the other party [for a reasonable period of time] in a way that allows for its or their storage and reproduction. [A data message is deemed not to be capable of being stored or reproduced if the originator inhibits the printing or storage of the data message or messages by the other party.]⁶¹

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

[*Article X*

*Declarations on exclusions*⁶²

1. 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.]

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.

⁵⁷ The reference to trade registers and registration numbers has been replaced with a more general reference to the corporate name and place of incorporation.

⁵⁸ The draft article, 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 (A/CN.9/509, paras. 123-125).

⁵⁹ 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.

⁶⁰ The words “and general conditions” have been deleted to avoid redundancy. The Working Group may however wish to consider whether the provision should be more explicit as to the version of the contract terms that needs to be retained.

⁶¹ The Working Group may wish to consider whether this sentence is sufficiently flexible to allow for the creation of “original” or “unique” electronic records, which the parties might have a legitimate interest in rendering incapable of replication (A/CN.9/509, para. 124).

⁶² The Working Group has not yet concluded its deliberations on possible exclusions to the preliminary draft convention under draft article 2 (A/CN.9/527, paras. 83-98). The draft article has been added as a possible alternative, in the event that no consensus could be achieved on possible exclusions to the preliminary draft convention.

[Article Y
*Relationship with other conventions*⁶³

1. Except as otherwise stated in a declaration issued in accordance with paragraph 2 of this article, a State party to this Convention undertakes to apply the provisions of this Convention to the formation of contracts and to the exchange of any communications, declarations, demands, notices or requests that the parties may wish to make or are required to make in connection with or under ...

Variant A

... 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)

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)

Variant B

... any international agreements or conventions on private commercial law matters to which the State is or may become a Contracting State.

2. Any State may declare at any time that it will not apply this Convention to international transactions 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].

⁶³ 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 (A/CN.9/WG.IV/WP.94). In that survey, the Secretariat had indicated that certain types of issues raised under the surveyed conventions might be addressed in the context of the Working Group's deliberations on the development of an international instrument dealing with some issues of electronic contracting. At the Working Group's fortieth session, 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). Variant B, in turn, would make it possible 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, as the Contracting State sees fit.

3. Any declaration made pursuant to paragraph 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.

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