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Report of Working Group IV (Electronic Commerce) on the work of its forty-first session**

(New York, 5-9 May 2003)

Contents

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** The present report could not be submitted earlier owing to the late dates of the session of the Working Group.

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I. Introduction: previous deliberations of the Working Group

1. At its thirty-third session, in 2000, the United Nations Commission on International Trade Law (UNCITRAL) held a preliminary exchange of views on proposals for future work in the field of electronic commerce. Three topics were suggested as indicating possible areas where work by the Commission would be desirable and feasible: electronic contracting, considered from the perspective of the United Nations Sales Convention on Contracts for the International Sale of Goods (the "United Nations Sales Convention");[1] online dispute settlement; dematerialization of documents of title, in particular in the transport industry.

2. The Commission welcomed the proposal to study further the desirability and feasibility of undertaking future work on those topics. The Commission generally agreed that, upon completing the preparation of the Model Law on Electronic Signatures, the Working Group would be expected to examine, at its thirty-eighth session, some or all of the above-mentioned topics, as well as any additional topic, with a view to making more specific proposals for future work by the Commission at its thirty-fourth session, in 2001. It was agreed that work to be carried out by the Working Group could involve consideration of several topics in parallel as well as preliminary discussion of the contents of possible uniform rules on certain aspects of the above-mentioned topics.[2] The Working Group considered those proposals at its thirty-eighth session, in 2001, on the basis of a set of notes dealing with a possible convention to remove obstacles to electronic commerce in existing international conventions (A/CN.9/WG.IV/WP.89); dematerialization of documents of title (A/CN.9/WG.IV/WP.90); and electronic contracting (A/CN.9/WG.IV/WP.91).

3. The Working Group held an extensive discussion on issues related to electronic contracting (A/CN.9/484, paras. 94-127). The Working Group concluded its deliberations on future work by recommending to the Commission that work towards the preparation of an international instrument dealing with certain issues in electronic contracting be started on a priority basis. At the same time, it was agreed to recommend to the Commission that the Secretariat be entrusted with the preparation of the necessary studies concerning three other topics considered by the Working Group: (a) a comprehensive survey of possible legal barriers to the development of electronic commerce in international instruments; (b) a further study of the issues related to transfer of rights, in particular, rights in tangible goods, by electronic means and mechanisms for publicizing and keeping a record of acts of transfer or the creation of security interests in such goods; and (c) a study discussing the UNCITRAL Model Law on International Commercial Arbitration, as well as the UNCITRAL Arbitration Rules, to assess their appropriateness for meeting the specific needs of online arbitration (A/CN.9/484, para. 134).

4. At the thirty-fourth session of the Commission, in 2001, there was wide support for the recommendations made by the Working Group, which were found to constitute a sound basis for future work by the Commission. Views varied, however, as regards the relative priority to be assigned to the different topics. One line of thought was that a project aimed at removing obstacles to electronic commerce in existing instruments should have priority over the other topics, in particular over the preparation of a new international instrument dealing with electronic contracting. It was said that references to "writing", "signature", "document" and other similar

provisions in existing uniform law conventions and trade agreements had already created legal obstacles and generated uncertainty in international transactions conducted by electronic means. Efforts to remove those obstacles should not be delayed or neglected by attaching higher priority to issues of electronic contracting.

5. The prevailing view, however, was in favour of the order of priority that had been recommended by the Working Group. It was pointed out, in that connection, that the preparation of an international instrument dealing with issues of electronic contracting and the consideration of appropriate ways for removing obstacles to electronic commerce in existing uniform law conventions and trade agreements were not mutually exclusive. The Commission was reminded of the common understanding reached at its thirty-third session that work to be carried out by the Working Group could involve consideration of several topics in parallel as well as preliminary discussion of the contents of possible uniform rules on certain aspects of the above-mentioned topics.[3]

6. There were also differing views regarding the scope of future work on electronic contracting, as well as the appropriate moment to begin such work. Pursuant to one view, the work should be limited to contracts for the sale of tangible goods. The opposite view, which prevailed in the course of the Commission's deliberations, was that the Working Group on Electronic Commerce should be given a broad mandate to deal with issues of electronic contracting, without narrowing the scope of the work from the outset. It was understood, however, that consumer transactions and contracts granting limited use of intellectual property rights would not be dealt with by the Working Group. The Commission took note of the preliminary working assumption made by the Working Group that the form of the instrument to be prepared could be that of a stand-alone convention dealing broadly with the issues of contract formation in electronic commerce (A/CN.9/484, para. 124), without creating any negative interference with the well-established regime of the United Nations Sales Convention (A/CN.9/484, para. 95), and without interfering unduly with the law of contract formation in general. Broad support was given to the idea expressed in the context of the thirty-eighth session of the Working Group that, to the extent possible, the treatment of Internet-based sales transactions should not differ from the treatment given to sales transactions conducted by more traditional means (A/CN.9/484, para. 102).

7. As regards the timing of the work to be undertaken by the Working Group, there was support for commencing consideration of future work without delay during the third quarter of 2001. However, strong views were expressed that it would be preferable for the Working Group to wait until the first quarter of 2002, so as to afford States sufficient time to hold internal consultations. The Commission accepted that suggestion and decided that the first meeting of the Working Group on issues of electronic contracting should take place in the first quarter of 2002.[4]

8. At its thirty-ninth session, the Working Group considered a note by the Secretariat discussing selected issues on electronic contracting, which contained in its annex I an initial draft tentatively entitled "Preliminary draft Convention on [International] Contracts Concluded or Evidenced by Data Messages" (A/CN.9/WG.IV/WP.95). The Working Group further considered a note by the Secretariat transmitting comments that had been formulated by an ad hoc expert group established by the International Chamber of Commerce to examine the issues

raised in document A/CN.9/WG.IV/WP.95 and the draft provisions set out in its annex I (A/CN.9/WG.IV/WP.96).

9. The Working Group began its deliberations by considering the form and scope of the preliminary draft convention (see A/CN.9/509, paras. 18-40). The Working Group agreed to postpone discussion on exclusions from the draft convention until it had had an opportunity to consider the provisions related to location of the parties and contract formation. In particular, the Working Group decided to proceed with its deliberations by first taking up articles 7 and 14, both of which dealt with issues related to the location of the parties (A/CN.9/509, paras. 41-65). After it had completed its initial review of those provisions, the Working Group proceeded to consider the provisions dealing with contract formation in articles 8-13 (A/CN.9/509, paras. 66-121). The Working Group concluded its deliberations on the draft convention with a discussion of draft article 15 (A/CN.9/509, paras. 122-125). The Working Group agreed that it should consider articles 2-4, dealing with the sphere of application of the draft convention, and articles 5 (Definitions) and 6 (Interpretation), at its fortieth session. The Working Group requested the Secretariat to prepare a revised version of the preliminary draft convention, based on those deliberations and decisions, for consideration by the Working Group at its fortieth session.

10. At its fortieth session, the Working Group was also informed of the progress that had been made by the Secretariat in connection with the survey of possible legal obstacles to electronic commerce in existing trade-related instruments. The Working Group was informed that the Secretariat had begun the work by identifying and reviewing trade-relevant instruments from among the large number of multilateral treaties that were deposited with the Secretary-General. The Secretariat had identified 33 treaties as being potentially relevant for the survey and analysed possible issues that might arise from the use of electronic means of communications under those treaties. The preliminary conclusions reached by the Secretariat in relation to those treaties were set out in a note by the Secretariat (A/CN.9/WG.IV/WP.94) that was submitted to the Working Group at its thirty-ninth session, in March 2002.

11. The Working Group took note of the progress that had been made by the Secretariat in connection with the survey, but did not have sufficient time to consider the preliminary conclusions of the survey. The Working Group requested the Secretariat to seek the views of member and observer States on the survey and the preliminary conclusions indicated therein and to prepare a report compiling such comments for consideration by the Working Group at a later stage. The Working Group took note of a statement stressing the importance that the survey being conducted by the Secretariat should reflect trade-related instruments emanating from the various geographical regions represented on the Commission. For that purpose, the Working Group requested the Secretariat to seek the views of other international organizations, including organizations of the United Nations system and other intergovernmental organizations, as to whether there were international trade instruments in respect of which those organizations or their member States acted as depositaries that those organizations would wish to be included in the survey being conducted by the Secretariat.

12. The Commission considered the Working Group's report at its thirty-fifth session, in 2002. The Commission noted with appreciation that the Working Group

had started its consideration of a possible international instrument dealing with selected issues on electronic contracting. The Commission reaffirmed its belief that an international instrument dealing with certain issues of electronic contracting might be a useful contribution to facilitate the use of modern means of communication in cross-border commercial transactions. The Commission commended the Working Group for the progress made in that regard. However, the Commission also took note of the varying views that had been expressed within the Working Group concerning the form and scope of the instrument, its underlying principles and some of its main features. The Commission noted, in particular, the proposal that the Working Group's considerations should not be limited to electronic contracts, but should apply to commercial contracts in general, irrespective of the means used in their negotiation. The Commission was of the view that member and observer States participating in the Working Group's deliberations should have ample time for consultations on those important issues. For that purpose, the Commission considered that it might be preferable for the Working Group to postpone its discussions on a possible international instrument dealing with selected issues on electronic contracting until its forty-first session, to be held in New York from 5 to 9 May 2003.[5]

13. As regards the Working Group's consideration of possible legal obstacles to electronic commerce that might result from trade-related international instruments, the Commission reiterated its support for the efforts of the Working Group and the Secretariat in that respect. The Commission requested the Working Group to devote most of its time at its fortieth session, in October 2002, to a substantive discussion of various issues that had been raised in the Secretariat's initial survey (A/CN.9/WG.IV/WP.94).[6]

14. At its fortieth session, held in Vienna from 14 to 18 October 2002, the Working Group reviewed the survey of possible legal barriers to electronic commerce contained in document A/CN.9/WG.IV/WP.94. The Working Group generally agreed with the analysis and endorsed the recommendations that had been made by the Secretariat (see A/CN.9/527, paras. 24-71). The Working Group agreed to recommend that the Secretariat take up the suggestions for expanding the scope of the survey so as to review possible obstacles to electronic commerce in additional instruments that had been proposed for inclusion in the survey by other organizations and explore with those organizations the modalities for carrying out the necessary studies, taking into account the possible constraints put on the Secretariat by its current workload. The Working Group invited member States to assist the Secretariat in that task by identifying appropriate experts or sources of information in respect of the various specific fields of expertise covered by the relevant international instruments.

15. The Working Group used the remaining time at its fortieth session to resume its deliberations on the preliminary draft convention, which it began 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 at its forty-first session.

II. Organization of the session

16. The Working Group on Electronic Commerce, which was composed of all States members of the Commission, held its forty-first session in New York, from 5 to 9 May 2003. The session was attended by representatives of the following States members of the Working Group: Austria, Brazil, Burkina Faso, Canada, China, Colombia, Fiji, France, Germany, Honduras, India, Italy, Iran (Islamic Republic of), Japan, Kenya, Lithuania, Mexico, Morocco, Paraguay, Russian Federation, Sierra Leone, Singapore, Spain, Sudan, Sweden, Thailand and the United States of America.

17. The session was attended by observers from the following States: Belarus, Belgium, Denmark, Dominican Republic, Finland, Gabon, Holy See, Ireland, Kuwait, Madagascar, Marshall Islands, Panama, Peru, Philippines, Poland, Qatar, Republic of Korea, Saudi Arabia, Sri Lanka, Switzerland, Syrian Arab Republic, Timor-Leste and Turkey.

18. The session was also attended by observers from the following international organizations:

(a) *Organizations of the United Nations system*: United Nations Development Programme and World Intellectual Property Organization;

(b) *Intergovernmental organizations*: Asian Clearing Union, European Commission and World Bank;

(c) *Non-governmental organizations invited by the Commission*: Association of the Bar of the City of New York—Committee on Foreign and Comparative Law, Centre for International Legal Studies, Inter-American Bar Association, International Association of Ports and Harbors, International Chamber of Commerce and International Law Institute.

19. The Working Group elected the following officers:

Chairman: Jeffrey Chan Wah Teck (Singapore)

Rapporteur: Ligia Claudia González Lozano (Mexico)

20. The Working Group had before it the following documents:

(a) Provisional agenda (A/CN.9/WG.IV/WP.99);

(b) Note by the Secretariat containing a revised version of the preliminary draft convention, which reflects the deliberations and decisions of the Working Group at its thirty-ninth and fortieth sessions (A/CN.9/WG.IV/WP.100);

(c) Note by the Secretariat transmitting comments thereon by a task force established by the International Chamber of Commerce (A/CN.9/WG.IV/WP.101);

(d) Note by the Secretariat transmitting further comments on the survey referred to in paragraph 10 that had been received from member and observer States and intergovernmental and international non-governmental organizations since the Working Group's fortieth session (A/CN.9/WG.IV/WP.98 and Add.5 and 6).

21. The following background documents were also made available to the Working Group:

(a) Reports of the Working Group's thirty-eighth, thirty-ninth and fortieth sessions (A/CN.9/484, A/CN.9/509 and A/CN.9/527, respectively);

(b) Notes by the Secretariat on legal barriers to the development of electronic commerce (A/CN.9/WG.IV/WP.89) and on electronic contracting (A/CN.9/WG.IV/WP.91), which are referred to in paragraph 2;

(c) Legal aspects of electronic commerce: proposal by France (A/CN.9/WG.IV/WP.93);

(d) Note by the Secretariat containing the initial version of the preliminary draft convention (A/CN.9/WG.IV/WP.95) and the comments that had been made thereon by an ad hoc expert group established by the International Chamber of Commerce (A/CN.9/WG.IV/WP.96);

(e) Note by the Secretariat referred to in paragraph 10 (A/CN.9/WG.IV/WP.94) and a note by the Secretariat transmitting comments on the survey received from member and observer States and intergovernmental and international non-governmental organizations (A/CN.9/WG.IV/WP.98 and Add.1-4) prior to the fortieth session.

22. The Working Group adopted the following agenda:

1. Election of officers.
2. Adoption of the agenda.
3. Electronic contracting: provisions for a draft convention.
4. Legal barriers to the development of electronic commerce in international instruments relating to international trade.
5. Other business.
6. Adoption of the report.

III. Summary of deliberations and decisions

23. The Working Group resumed its deliberations on the preliminary draft convention by holding a general discussion on the purpose and nature of the preliminary draft convention (see paras. 28-31).

24. The Working Group reviewed articles 1-11 of the revised preliminary draft convention contained in annex I to the note by the Secretariat (A/CN.9/WG.IV/WP.100). The decisions and deliberations of the Working Group with respect to the draft convention are reflected in section IV below (see paras. 26-151). The Secretariat was requested to prepare a revised version of the preliminary draft convention, based on those deliberations and decisions for consideration by the Working Group at its forty-second session, tentatively scheduled to take place in Vienna from 17 to 21 November 2003.

25. In accordance with a decision taken at its fortieth session (A/CN.9/527, para. 93), the Working Group also held a preliminary discussion on the question of excluding intellectual property rights from the draft convention (see paras. 55-60). The Working Group also exchanged views on the relationship between the draft

convention and the Working Group's efforts to remove possible legal obstacles to electronic commerce in existing international instruments relating to international trade within the context of its preliminary review of draft article X, which the Working Group agreed to retain in substance for further consideration.

IV. Electronic contracting: provisions for a draft convention

General comments

26. The Working Group noted that, at its thirty-ninth session, held in New York from 11 to 15 March 2002, it had begun its deliberation on the preliminary draft convention by holding a general exchange of views on the form and scope of the instrument (see A/CN.9/509, paras. 18-40). At that time, the Working Group had agreed to postpone discussion of exclusions from the draft convention until it had had an opportunity to consider the provisions related to location of the parties and contract formation. In particular, the Working Group had then proceeded with its deliberations by firstly taking up articles 7 and 14, both of which dealt with issues related to the location of the parties (A/CN.9/509, paras. 41-65). After it had completed its initial review of those provisions, the Working Group proceeded to consider the provisions dealing with contract formation in articles 8-13 (A/CN.9/509, paras. 66-121). The Working Group concluded its deliberations on the draft convention at that session with a discussion on draft article 15 (A/CN.9/509, paras. 122-125).

27. The Working Group resumed its deliberations on the draft convention at its fortieth session, held in Vienna from 14 to 18 October 2002, and again considered general issues relating to the scope of the draft instrument (see A/CN.9/527, paras. 72-81). The Working Group then proceeded to consider articles 2-4, dealing with the scope of application of the draft convention (A/CN.9/509, paras. 82-104); article 5, containing definitions of terms used in the draft convention (A/CN.9/509, paras. 111-122); and article 6, which set forth rules of interpretation (A/CN.9/509, paras. 123-126). The Working Group concluded its deliberations with a request to the Secretariat to prepare a revised version of the preliminary draft convention, based on those deliberations and decisions for consideration by the Working Group at its forty-first session.

Purpose and nature of the instrument

28. At the current session, the Working Group decided to resume its deliberations on the preliminary draft convention by holding a general discussion on the scope of the Convention.

29. The Working Group noted that a task force that had been established by the International Chamber of Commerce had submitted substantive comments on the scope and purpose of the draft convention (A/CN.9/WG.IV/WP.101). It was pointed out that, subsequent to the fortieth session of the Working Group, consultations with business entities from various sectors and of various sizes had been conducted concerning their experience with electronic contracting and the problems that arose in practice in electronic contracting so as to consider ways in which an international instrument could create more certainty. The aim of those consultations had been to assess the needs of global business in relation to electronic contracting.

30. It was stated that the main conclusions from those consultations had been that electronic contracting was not fundamentally different from paper contracting and that most issues arising in electronic contracting could be dealt with by the legal regime applying to paper contracts. It had also been found that the problems arising in the context of electronic contracting were due in large part to the absence of experience in electronic contracting and an absence of knowledge on how best to solve those problems. On that basis, it was felt that an international instrument might not be the best way to resolve those problems, but rather that legal certainty in electronic contracting could be provided by giving users a combination of voluntary rules, model clauses and guidelines, which could be developed in cooperation between UNCITRAL and international non-governmental organizations representing the private sector. The advantage of that approach would be its flexibility in that business could take up components of the standards or model clauses that could be amended easily if necessary.

31. The Working Group generally welcomed the work being undertaken by the private sector representatives, such as the International Chamber of Commerce, which was considered to complement usefully the work being undertaken in the Working Group to develop an international convention. The Working Group was of the view that the two lines of work were not mutually exclusive, in particular as the draft convention dealt with requirements that were typically found in legislation and that, being statutory in nature, those obstacles could not be overcome by contractual provisions or non-binding standards.

Article 1. Scope of application

32. The text of the draft article was as follows:

> "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]; or
>
> "(c) When the parties have agreed that it applies.
>
> "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."

General comments

33. The Working Group noted that the draft article reflected essentially the scope of application of the United Nations Sales Convention, as set out in its article 1. The

Working Group also noted that the draft article reflected its earlier decision, at its thirty-ninth session, that the draft convention should be limited to international transactions so as not to interfere with domestic law (A/CN.9/509, para. 31).

34. In that connection, the Working Group heard reservations as to the manner in which the scope of application of the draft article had been formulated. It was pointed out that, to the extent that the purpose of the draft instrument might be to remove possible obstacles to electronic commerce that might arise under existing international instruments, such as those referred to in draft article Y, its field of application should be aligned with the field of application of those instruments.

35. In response to those observations, it was pointed out that the purpose of the draft convention was broader than merely adapting the rules of existing instruments to electronic commerce, as the draft convention might extend to contracts not yet covered by any international convention in force. As such, the draft convention might have an autonomous field of application. The Working Group therefore agreed that the manner in which the field of application of the draft convention was defined in the draft article could be retained, but that the Working Group should consider possible difficulties in the relationship between the draft article and draft article Y at an appropriate stage.

Paragraph 1

36. Several questions were raised concerning the meaning of the expression "transactions" in the draft paragraph and elsewhere in the draft convention and its appropriateness to describe the substantive field of application of the draft convention.

37. The Working Group was reminded that, at its fortieth session, it had been agreed that it might be useful to consider extending the scope of the preliminary draft convention to issues beyond contract formation, so as to include also the use of electronic messages in connection with the performance or termination of contracts. Moreover, the Working Group had then been invited to consider dealing not only with electronic contracts or contract-related communications, but also with other transactions conducted electronically, subject to specific exclusions that the Working Group might deem appropriate (A/CN.9/527, para. 77).

38. While there was general agreement within the Working Group on extending the scope of application of the preliminary draft convention beyond the use of data messages for contract formation, several objections were raised to the use of the word "transactions". It was pointed out that the term was not used in several legal systems and that it might have an excessively broad meaning for the purposes of the draft convention. It was felt that the proposed definition of "transactions" in draft article 5, subparagraph l, was not sufficiently precise to avoid those difficulties, in particular as it referred to "governmental affairs", which were said to fall clearly outside the intended scope of the draft convention.

39. In view of those comments, the Working Group paused to consider alternative solutions for describing the field of application of the draft convention. One possible alternative to the current wording, which gathered some support, was to make reference to the use of data messages "in the context of legal acts or contracts between parties having their places of business in different States". However, that suggestion was objected to on the grounds that the notion of "legal acts" was

unclear in some legal systems and that it seemed to imply extending the scope of application of the draft convention to the use of data messages in situations that were not contractual in nature, a proposition on which there was no consensus within the Working Group at that time (see also A/CN.9/527, para. 78). Another proposal was to link the definition of the scope of application to the types of use of data messages mentioned in draft article 10. However, that proposal, too, gave rise to objections, as it might result in a circular definition of the field of application of the draft convention.

40. It was then pointed out to the Working Group that the actual subject matter covered by the draft convention could be inferred from its operative provisions, rather than from draft article 1, which was meant only to provide a general indication of the substantive field of application of the draft convention. It was said, in that connection, that the words "in the context of contracts", as used in the draft article, were sufficiently broad as to encompass most if not all of the situations referred to in draft article 10. The Working Group was then invited to retain the phrase currently used in paragraph 1 of the draft article, without the word "transactions", and to revisit the definition of the substantive scope of application once it had had an opportunity to consider the operative provisions of the draft convention, in particular draft article 10, with a view of ascertaining whether there were any additional situations that needed to be covered by the draft convention that were not covered by the phrase "in the context of contracts" in the draft article. The Working Group concurred with that suggestion.

41. The Working Group proceeded to consider which of the first two sets of language within square brackets (i.e. "[any kind of information in the form of data messages that is used]" or "[the use of data messages]") should be used to describe the scope of application of the draft convention. In favour of the first option, it was said that the reference to "information" was in line with the objective of media neutrality and would cover situations where the parties used different media. That was said to be of great practical importance, since many contracts were concluded by a mixture of oral conversations, telefaxes, paper contracts, electronic mail (e-mail) and web communication (see A/CN.9/509, para. 34). In favour of the second option, it was pointed out that it was more concise and avoided repeating the word "information", which was already contained in the definition of "data message" in draft article 5, subparagraph (a). As it was suggested that the choice between the two options was more a matter of style than of substance, the Working Group decided to retain both options for the time being and to revert to the matter at a later stage.

42. With regard to subparagraph (b), which currently appeared within square brackets, the Working Group noted that the rule contained therein was derived from the provisions on the sphere of application of the United Nations Sales Convention and other UNCITRAL instruments. Although it had been suggested that the phrase should be deleted, the Working Group, at its thirty-ninth session, had decided to retain it for further consideration (A/CN.9/509, para. 38). At the current session, the Working Group agreed to remove the square brackets around the provision and to consider, at a later stage, a proposal for adding a provision allowing a Contracting State to exclude the application of the subparagraph, as had been done by article 95 of the United Nations Sales Convention.

43. As regards draft subparagraph (c), the Working Group noted that the possibility for the parties to subject a contract to the regime of the draft convention in the absence of other connecting factors was provided, for instance, in article 1, paragraph 2, of the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (General Assembly resolution 50/48, annex).

44. The Working Group decided to postpone its deliberations on that particular matter until it had considered the operative provisions of the draft convention.

Paragraph 2

45. It was pointed out that the draft paragraph followed a similar rule contained in article 1, paragraph 2, of the United Nations Sales Convention, which applied to international contracts if both parties were located in Contracting States of the Convention, but not when such a situation was not apparent either from the contract or from the dealings between the parties. In those cases, the United Nations Sales Convention gave way to the application of domestic law. The incorporation of a similar rule in the draft convention was to be welcomed, it was said, so as not to frustrate the legitimate expectations of parties that assumed they were operating under their domestic regime given the absence of a clear indication to the contrary.

46. Nevertheless, questions were raised regarding the appropriateness of the draft paragraph in the context of the draft convention, in particular in the light of draft article 15, which contemplated an obligation for the parties to disclose their places of business. If such an obligation was retained, the parties should normally have available to them sufficient elements to allow them to ascertain whether or not a contract was international for the purposes of the draft convention. The draft paragraph, it was said, would only become relevant in the event of failure by a party to comply with draft article 15. The question was asked whether the non-applicability of the convention would be the most appropriate sanction for failure to comply with article 15.

47. In response, it was pointed out that paragraph 2 was not meant to provide sanctions for failure to comply with draft article 15. Furthermore, given that the Working Group had yet to decide whether or not draft article 15, which currently appeared within square brackets, should be retained, it was suggested that it would be premature to change the formulation of paragraph 2 of draft article 1. The Working Group agreed with that suggestion and decided that it might return to draft paragraph 2 after it had made a final decision on draft article 15.

Paragraph 3

48. The draft paragraph did not give rise to comments and was retained by the Working Group with its current formulation.

Article 2. Exclusions

49. The text of the draft article was as follows:

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;

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

"(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]."

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."

General comments

50. The Working Group noted that the essential difference between variants A and B lay in the manner in which each of them excluded consumer protection matters from the scope of application of the draft instrument. While variant A contained an exclusion modelled on article 2, subparagraph (a), of the United Nations Sales Convention, variant B refrained from offering a definition of consumer transactions, leaving consumer protection rules unaffected by the draft convention.

Consumer transactions

51. It was recalled that the Working Group had agreed that the draft convention should not be concerned with consumer contracts on the grounds that many States already had strong domestic legislation relating to consumer contracts (A/CN.9/527, paras. 83-85) and that UNCITRAL did not have the mandate to deal with consumer issues.

52. Some support was expressed for variant A with the suggested modification that all of the words following the phrase "household purposes" should be deleted to prevent an uncertain provision based on what was or ought to have been known by the party offering the goods or service. Some support was expressed for that approach, provided that, to ensure the preservation of consumer rights, the words used in variant B, paragraph 3, namely, "This Convention does not override any rule of law intended for the protection of consumers" were also retained in the text.

53. Some delegations however took the view that it would be premature to make a final decision on how to exclude consumer transactions at the present stage of the discussion. In support of the approach to leave the question of application to consumer transactions open, it was said that the draft convention appeared to be a

technical one that was meant to facilitate the application of provisions that were derived from other international instruments and in domestic law. It was also said that consumers needed legal certainty in the area of electronic business transactions as much as business needed such certainty. Following that approach, it was suggested that preference ought to be given to variant B on the basis that it appeared to ensure that consumers would gain the benefit of certainty offered by the future convention without it being at the expense of consumer protection legislation.

54. The Working Group took note of the varying views that were expressed, in particular the reiterated objections to leaving any doubts about the exclusion of consumer transactions from the scope of the draft convention. The Working Group decided that the matter required further consideration once it had considered the provisions in chapter III of the draft convention.

Licensing contracts

55. It was noted that both variants excluded contracts relating to the limited use of intellectual property rights. That exclusion reflected 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).

56. Pursuant to one view, the exclusion contained in that paragraph should be retained with a view to preventing potential conflict with existing intellectual property regimes. A note of caution was expressed that the future convention ought not to conflict with existing international instruments on the protection of intellectual property rights.

57. The countervailing view, which gathered strong support, was that inasmuch as the draft convention did not deal with substantive aspects of intellectual property rights, it was not necessary to exclude licensing contracts. It was also said that, since the draft convention was concerned with the use of data messages in contract formation and not with the way in which a contract was to be executed or performed, the exclusion of contracts relating to intellectual property rights might deprive those contracts of the benefit of legal certainty that the draft convention aimed to provide. It was also stated that, in its current broad formulation, the exclusion might be understood to encompass contracts that were not concerned primarily with licensing of intellectual property rights, but that nevertheless included such a licence as a part of a broader series of rights. That was said to be the case in respect of various types of contract routinely used in certain industries, such as in the telecommunication industry, which might otherwise wish to have their contracts benefit from the provisions of the draft convention.

58. Having considered the varying views on the matter, it was agreed that the Secretariat should be requested to seek the specific advice of relevant international organizations, such as the World Intellectual Property Organization and the World Trade Organization, as to whether, in the view of those organizations, including contracts that involved the licensing of intellectual property rights in the scope of the draft convention so as to expressly recognize the use of data messages in the context of those contracts might negatively interfere with established rules on the protection of intellectual property rights.

59. In the light of those discussions, the Working Group agreed to retain both subparagraph (b) of variant A and subparagraph (a) of variant B of draft article 2 in square brackets, pending further consultations with relevant bodies. It was agreed that whether or not such exclusion was necessary would ultimately depend on the substantive scope of the convention.

60. The Working Group noted that, to the extent that its work on the draft convention might constitute a basis for removal of possible obstacles to electronic commerce in existing international conventions, such as the United Nations Sales Convention, consideration might be given to addressing an issue that had been the cause of some controversy in the application of the United Nations Sales Convention, namely, whether that Convention also applied to transactions involving so-called "virtual goods" or "digitalized goods". The Working Group was reminded of the different interpretations that had been given to the term "goods" under the United Nations Sales Convention in various jurisdictions and to the conflicting conclusions that had been reached on that issue. The Working Group further noted that work was being undertaken by the World Trade Organization as to whether electronic commerce transactions should be classified as transactions involving trade in goods or trade in services. The outcome of that work by the World Trade Organization could potentially have an impact on the question before the Working Group. In order not to pre-empt any agreement that States might arrive at in another forum and in view of the fact that there were no concrete proposals at the moment to amend or clarify the notion of "goods" under the United Nations Sales Convention, it was agreed that the Working Group would give no further consideration to the matter.

Additional exclusions

61. The Working Group noted that the draft article might contain additional exclusions, as might be decided by the Working Group. With a view to facilitating the consideration of that issue by the Working Group, annex II of the initial draft (A/CN.9/WG.IV/WP.95) reproduced, for illustrative purposes and with no intention of being exhaustive, exclusions typically found in domestic laws on electronic commerce that had been proposed at the Working Group's fortieth session (A/CN.9/527, para. 95). The second phrase in square brackets in the subparagraph was an alternative formulation that would obviate the need for a common list of exclusions (A/CN.9/527, para. 96).

62. It was proposed that other exclusions that should be included in the text of subparagraph (c) should be those listed in footnote 7 of A/CN.9/WG.IV/WP.100 relating to financial transactions, namely, contracts involving "payment systems, negotiable instruments, derivatives, swaps, repurchase agreements (repose), foreign exchange, securities and bond markets". It was said that such transactions were already subject to well-defined regulatory and non-regulatory rules and thus should be excluded from the reach of the draft convention. However, concern was expressed that the exclusion of financial transactions from the draft convention would be retrograde to the facilitation and promotion of the use of electronic commerce. It was suggested that financial transactions was an important area in which to develop electronic means of communication.

63. It was also suggested that real estate transactions, as well as contracts involving courts or public authorities, family law and the law of succession should also be excluded from the scope of the draft convention.

64. The Working Group took note of those suggestions and agreed that it should revert to the draft article, possibly at a future session, once it had had an opportunity to consider the operative provisions of the draft convention.

Article 3. Matters not governed by this Convention

65. The text of the draft article was as follows:

> "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 […]];
>
> "(b) The rights and obligations of the parties arising out of the [transaction] [contract] or of any of its provisions or of any usage;
>
> "(c) The effect which the [transaction] [contract] may have on the ownership of rights created or transferred by the [transaction] [contract]."

66. The Working Group recalled that draft subparagraphs (a) and (c) were derived from article 3 of the United Nations Sales Convention. It was noted that those provisions had been included so as to make it clear that the convention was not concerned with substantive issues arising out of the contract, which, for all other purposes, remained subject to its governing law (see A/CN.9/527, paras. 10-12). Draft subparagraph (c) was based, mutatis mutandis, on article 4, subparagraph (b), of the United Nations Sales Convention.

67. As a matter of drafting, it was suggested that the words "this Convention is not concerned with" were inaccurate and that the draft article should instead use words such as "This convention does not affect the rules of national law relating to".

68. The Working Group was reminded that the goal of the convention was to provide standards of functional equivalence and enhance legal certainty, in particular for countries that did not have laws governing electronic means of communication. However, there seemed to be some tension between draft subparagraph (a), as currently formulated, and draft article 14, which was meant to provide criteria for fulfilling form requirement, even as they pertained to the validity of contracts. One way to clarify the relationship between the two provisions might be to include the words "With the exception of processes and procedures as to data messages under this Convention, this Convention does not affect", or a similar phrase to that effect, as the opening words of draft article 3.

69. The Working Group took note of those suggestions and decided to consider them when it resumed its consideration of the draft article, which it agreed to postpone pending its deliberations on the operative provisions of chapter III of the draft convention.

Article 4. Party autonomy

70. The text of the draft article was as follows:

> "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: ...].
>
> "[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.]"

71. It was pointed out that draft paragraph 1 was a standard clause in that it appeared in other international instruments setting out the limits of the instrument and the principle of party autonomy. Paragraph 2 had been added to draft article 4 to reflect 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).

72. The view was expressed that it was essential that the right of a party to derogate from the application of the convention should not be restricted. In that respect, it was suggested that the bracketed text, namely, the words "except for the following", should be deleted from the text to make it clear that a party's right to exclude the application of the Convention or derogate or vary any of its provisions was totally unrestricted.

73. A contrary view was that the square brackets in paragraph 1 of draft article 4 should be removed and that the Working Group should consider which provisions of the convention ought to be mandatory. It was said that, in its current formulation, article 4 was too broadly drafted and might permit parties to flout form requirements in conflict with draft article 14. To the extent that draft article 14 already contemplated minimum requirements for the recognition of functional equivalence, so as to satisfy mandatory requirements as to form prescribed by national law, draft article 4 should not allow the parties to lessen those requirements. It was pointed out that such an approach would be consistent with texts previously adopted by UNCITRAL, in particular with the Model Law on Electronic Signatures (General Assembly resolution 56/80, annex), which provided, in its article 5, that derogation or variation of its provisions by agreement might not be permissible where any such variation or derogation "would not be valid or effective under applicable law".

74. In response, it was suggested that the limitations to party autonomy under article 5 of the UNCITRAL Model Law on Electronic Signatures did not exclude the ability of any person to establish the reliability of an electronic signature by any means other than by those referred to in article 6, paragraph 3, of the Model Law, as clearly stated in paragraph 4 (a) of the same article. A similar element of flexibility, it was said, was contemplated in variant B of draft article 14. If the proposed changes to draft article 4 were meant to preserve the applicability of mandatory form requirements, it was suggested that a better way of achieving that result might be by way of appropriate exclusions under draft article 2. Limiting party autonomy under draft article 4 or providing an open-ended exclusion in favour of domestic form requirements under draft article 3 were said to be undesirable options, which, if accepted, might defeat the very purpose of draft article 14.

75. Having considered the various views that were expressed, the Working Group agreed to defer finalizing draft article 4 until other operative provisions of the convention, in particular its draft article 14, had been fully considered.

Article 5. Definitions

76. The text of the draft article was as follows:

"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 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;

"(g) 'Offeror' means a natural person or legal entity that offers goods or services;

"(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;

"[(j) 'Place of business' means"

Variant A

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

Variant B

"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;]

"[(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;]

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

77. The Working Group noted that the definitions contained in draft paragraphs (a)-(d) and (f) were derived from article 2 of the UNCITRAL Model Law on Electronic Commerce. It was suggested that it would be appropriate to deal with any issues that arose under any of the proposed definitions within the context of the operative articles in which the terms defined were used. The Working Group agreed to that suggestion and consideration of the definitions was deferred accordingly.

Article 6. Interpretation

78. The text of the draft article was as follows:

"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]."

79. The Working Group noted that the draft article mirrored article 7 of the United Nations Sales Convention and similar provisions in other UNCITRAL instruments. The Working Group further noted that the closing phrase had been placed in square brackets at the request of the Working Group at its fortieth session. 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 rules on conflict of laws contained in the convention itself (A/CN.9/527, paras. 125 and 126).

80. The Working Group decided to retain the draft article, as currently formulated, for consideration at a later stage, after it had considered the operative provisions contained in chapter III of the draft convention.

Article 7. Location of the parties

81. The text of the draft article was as follows:

"1. For the purposes of this Convention, a party is presumed to have its place of business at the geographical 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].

"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, subparagraph (j)]].

"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."

General comments

82. The Working Group noted that the draft article was one of the central provisions in the convention and one that might be essential, if the scope of application of the convention was defined along the lines of draft article 1.

Paragraph 1

83. The Working Group noted that draft paragraph 1 built upon a proposal that had been 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 was reflected in draft article 15, paragraph 1 (b), but the draft provision, it was noted, was not intended to create a new concept of "place of business" for the online world.

84. There was general agreement in principle within the Working Group as to the desirability of including a provision that offered elements that allowed the parties to ascertain beforehand the location of their counterparts, thus facilitating a determination, among other factors, of the international or domestic character of a contract and the place of contract formation. However, in the course of the Working Group's extensive discussions on the draft paragraph, varying views were voiced concerning other possible objectives that should be pursued by the draft article and the best ways of expressing them.

85. It was suggested that the cross reference to draft article 15 should be deleted, as the latter provision was addressed primarily, even if not expressly so, at parties offering goods or services through an information system that was generally accessible to the public. It was also pointed out, in support of that suggestion, that an indication of a party's place of business might be surmised from other dealings between the parties, as implied by draft article 1, paragraph 2, and not only from a statement made pursuant to draft article 15. Although there were views in favour of retaining the cross reference to draft article 15, and in favour of stating in draft article 7 itself the indications to be given by a party using data messages as to its location, the prevailing view within the Working Group was in support of deletion of the cross reference to draft article 15.

86. The Working Group proceeded to consider the conditions under which the presumption established by the draft paragraph might be rebutted. The Working Group noted that the words "manifest and clear" were meant to raise the standard of proof required to rebut the presumption established by the draft paragraph 1, which was generally felt to be desirable. However, the prevailing view within the Working Group was that it might be preferable to delete those words, as they required a subjective judgement that would not contribute to the uniform application of the future convention.

87. The Working Group proceeded then to consider the choice between the two variants proposed in the draft paragraph. One view, which received strong support, was that, for the purpose of enhancing legal certainty in the interpretation of the draft paragraph, variant A was preferable to variant B. In particular the last phrase within square brackets in variant B ("and such indication is made solely to trigger or avoid the application of this Convention") was said to be of questionable usefulness, as the parties were in any event free, under draft article 1, paragraph 3, to agree to the application of the draft convention or, under draft article 4, to exclude its application. Moreover, by requiring proof of a party's intention, variant B introduced an element of subjectivity, which was said to be of difficult practical application. It was also said that the clause in question did not easily fit with the scope of the draft convention, since the legal consequences of intentional misrepresentations made by the parties were a matter of criminal or tort law, which should best be left for the applicable law outside the draft convention.

88. The countervailing view, which was also widely shared, was that, despite the apparent subjectivity implied by its language, variant B was more conducive to ensuring legal certainty than variant A, in view of the high standard required to rebut the presumption of the *chapeau* of paragraph 1. Variant A, it was said, rendered the rebuttal of the presumption a simple factual question, whereas variant B only allowed the rebuttal of the presumption when a false or inaccurate indication of place of business had been made by a party for the purpose of triggering or avoiding the application of the convention. Therefore, variant B was said to be more favourable to a consistent application of the convention to contracts that appeared to meet the territoriality criteria set forth in draft article 1.

89. In the course of its search for a consensus on the matter, the Working Group considered various alternative proposals for the formulation of the draft paragraph. One such proposal was to replace the draft paragraph with a provision to the effect that a party that indicated it was located in a contracting State should be deemed to be located in that contracting State. That proposal was said to be preferable to the

current formulation, as it stated more clearly the purpose of the draft article, which was to support the application of draft article 1, and attributed legal consequences to a party's representations, without the uncertainties that might be raised by a system of presumptions. Another alternative proposal was to reformulate the draft paragraph to emphasize the conditions under which a party might rely upon an indication of a place of business made by the other party. For that purpose, it was suggested that the draft paragraph should provide that a party was presumed to be located at the place indicated by it unless the other party knew or ought to have known that such indication was false or inaccurate.

90. The difficulty of reaching a consensus on the draft paragraph, it was said, resulted from the fact that draft paragraph 1, and possibly draft paragraphs 2 and 3, did not contain rules specific to the use of electronic means of communications. In the interest of advancing the deliberations of the Working Group, while focusing on issues specific to electronic contracting, it was proposed that only paragraphs 4 and 5 of the draft article 7 should be retained, possibly combined with the definition of "place of business" in draft article 5, subparagraph (j). The prevailing view within the Working Group, however, was that, if adequately crafted, the principles underlying paragraphs 1-3 of draft article 7 provided useful solutions to address the considerable legal uncertainty that was caused at present by the difficulty of determining where a party to an online transaction was located. While that danger had always existed, the global reach of electronic commerce had made it more difficult than ever to determine location. Helping to avoid a problem made more conspicuous by electronic commerce was said to be a valuable objective of the draft article.

91. Having considered the various comments that had been made, the Working Group generally felt that it should consider further the provisions dealing with the location of the parties. The Secretariat was requested to prepare a revised version of the draft paragraph that presented alternative options that reflected the various proposals that had been made.

Paragraphs 2 and 3

92. The Working Group noted that draft paragraphs 2 and 3 reflected traditional rules applied to determine a party's place of business that were used, for instance, in article 10 of the United Nations Sales Convention. The Working Group decided to retain those draft paragraphs for consideration at a later stage.

Paragraphs 4 and 5

93. The Working Group noted that the draft paragraphs proposed rules specifically concerned with issues raised by the use of electronic means of communication in contract formation. Draft paragraph 4 was 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). Draft paragraph 5 reflected 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

was often insufficient to conclude that there was a genuine and permanent link between the domain name user and the country (A/CN.9/509, paras. 44-46). The Working Group decided to retain those draft paragraphs for consideration at a later stage.

Article 8. Use of data messages in contract formation

94. The text of the draft article was as follows:

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

95. The Working Group noted that the draft article had been extensively reformulated since the thirty-ninth session of the Working Group so as to reflect the wish prevailing within the Working Group to limit any substantive provisions to those which were strictly required to facilitate the use of data messages in the formation of international contracts (A/CN.9/509, paras. 67-73).

Paragraph 1

96. The Working Group accepted a proposal to delete the phrase "Unless otherwise agreed by the parties" at the opening of the draft paragraph, as there was no need to repeat the principle of party autonomy, which had already been stated in draft article 4.

97. Differing views were expressed, however, concerning the need for and usefulness of the bracketed words "or other actions communicated electronically in a manner that is intended to express the offer or acceptance of the offer". Pursuant to one view, those words were useful to clarify that offer or acceptance could be effected by conduct other than the sending of a data message containing a written text of offer or acceptance, such as by touching or clicking on a designated icon or place on a computer screen. Such a clarification, which was contained in legislation on electronic commerce in some jurisdictions, was important in the draft text, as it gave express recognition to a growing practice in electronic commerce.

98. The countervailing view, which eventually prevailed once the Working Group had considered the use of a similar phrase in draft article 10, paragraph 1 (see para. 126), was that the words in question might add uncertainty, rather than enhance clarity in the application of the convention. An earlier version of the text, which had made an illustrative reference to indication of assent by "touching or clicking on a designated icon or place on a computer screen" had been rejected by the Working Group at its thirty-ninth session, as not being consistent with the principle of technological neutrality and because it carried the risk of being incomplete or becoming dated, as other means of indicating assent not expressly

mentioned therein might already be in use or might possibly become widely used in the future (A/CN.9/509, para. 89). As currently drafted, however, the phrase was vague and did not provide sufficient indication of the types of action being contemplated, and for that reason it might be preferable to delete the phrase altogether.

99. In support of the deletion of the words in square brackets, it was further stated that domestic legislation that had included additional illustrations of conduct indicating acceptance in a context similar to the draft article had done so for specific reasons, namely, that they used concepts such as "electronic document" or "electronic record", and there might be doubts as to whether they encompassed actions other than the sending of messages in electronic form containing a written text of offer or acceptance. However, the context of the draft convention was different in that any of the actions purported to be covered by the words in question would in fact generate a data message in the meaning given to that expression in draft article 5, subparagraph (a). Any additional illustration that the Working Group might deem necessary could be provided in an explanatory text accompanying the draft convention. Another possibility might be to include appropriate clarification in the definition of "data message", a proposal, however, that was received with reservations, in view of the undesirability of altering an accepted definition that had been already used in two model laws and in domestic legislation.

100. Having considered those views, the Working Group decided to delete the words in square brackets in the draft paragraph and elsewhere in the draft convention.

Paragraph 2

101. The Working Group noted that rules in the draft paragraph reflected 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 was used in the United Nations Sales Convention, had been replaced with the verb "receive" in the draft article so as to align it with draft article 11, which was based on article 15 of the UNCITRAL Model Law on Electronic Commerce.

102. The Working Group held an extensive discussion on the need to retain the draft paragraph in the draft convention, in the course of which it reverted to various aspects of a debate that had taken place at its thirty-ninth session (A/CN.9/509, paras. 67-73).

103. In favour of the deletion of the draft paragraph, it was pointed out that the provision did not specifically address the issues of electronic contracting to which the draft convention should confine itself. Strong support was expressed in favour of the view that, even in its current form, which was meant to be limited in scope to electronic commerce transactions, the draft paragraph should still be deleted to avoid the creation of a dual regime where different rules would govern the time of formation of an electronic commerce contract within the draft instrument and the time of formation of other types of contract outside the purview of the draft instrument. If the purpose of the draft paragraph, it was said, was to facilitate a determination of the time of contract formation when data messages were used for that purpose, the issue was regarded as being adequately dealt with by draft

article 11. Also in favour of deletion of draft article 8, it was stated that no attempt should be made to provide a rule on the time of contract formation that might be at variance with the rules on contract formation of the law applicable to any given contract. It was pointed out that there were domestic laws under which a contract would typically be formed when the offeror became aware of the acceptance of the offer (a theory known as contract formation through "information" of the offeror, as opposed to the mere "receipt" of the acceptance by the offeror). The draft paragraph interfered with the application of those rules and should therefore be deleted.

104. In response to those views, it was stated that the draft paragraph, in combination with draft article 11, offered useful provisions to facilitate a determination on the formation of a contract by electronic means. If the specific focus of the draft paragraph on electronic contract issues was not sufficiently clear, the text could be amended to refer to "data messages containing an offer or an acceptance". The alleged risk of duality of regimes, it was further said, was inherent to many uniform law instruments, such as the United Nations Sales Convention, to the extent that those instruments might provide different rules from those which would apply to purely domestic contracts or under the law otherwise applicable in the absence of an international convention. The usefulness of the draft paragraph was moreover justified by the fact that even where an international convention governed a particular contract, such a convention might not provide rules on contract formation.

105. The Working Group considered at length the arguments that were put forward by both lines of thought, and considered proposals to eliminate the reasons for concern that had been raised. One such proposal, which received some support, was to delete the draft article and combine the remainder of draft article 8 with draft article 10. Another proposal was to reformulate the draft paragraph along the following lines:

> "2. Where the law of a Contracting State attaches consequences to the moment in which an offer or an acceptance of an offer reaches the offeror or the offeree, and a data message is used to convey such offer or acceptance, the data message is deemed to reach the offeror or the offeree when it is received by him."

106. The Working Group noted that, although the proposal to delete the draft paragraph had obtained greater support than the retention of the provision, there was not sufficient consensus in the Working Group to make a firm decision on the matter. The Working Group therefore agreed to retain the provision in square brackets for further consideration at a later stage. The Working Group accepted that the word "addressee" should be used in a future version of the draft paragraph instead of the words "the offeror and the offeree".

Paragraph 3

107. Strong support was expressed for the proposal that, to avoid unnecessary repetition, the draft paragraph should be deleted, since draft paragraph 1 already recognized expressly the possibility of offer and acceptance being expressed by means of data messages.

108. The countervailing view, which the Working Group eventually adopted, was that it should retain the draft paragraph for further consideration, as it restated the

general rule of non-discrimination of data messages, which was one of the fundamental principles of the UNCITRAL Model Law.

Article 9. Invitations to make offers

109. The text of the draft article was as follows:

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

Variant A

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

Variant B

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

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

111. It was recalled that paragraph 1 was intended to cover advertisements of goods and services made on web sites and aimed to treat such advertisements as equivalent to notices or advertisements made in shop windows, namely, as an invitation to treat rather than as a formal offer. It was suggested that the term "offer" used in paragraph 1 of draft article 9 could actually undermine that intention and therefore the term should be replaced with a more objective term such as the term "advertisement". While support was expressed for the suggestion to seek a more objective term, concern was expressed at the use of the term "advertisement".

112. It was questioned whether the example set out in paragraph 1, namely, "such as the offer of goods and services through an Internet web site", should be included in the draft provision at all. It was suggested that it would be better placed in explanatory material relating to the convention.

113. It was further suggested that the use of the term "offeror" in paragraph 1 was also confusing if read with the definition of the term as set out in draft paragraph 5 (g), which defined the term as "a natural person or legal entity that offers goods or services". It was suggested that the definition of "offeror" would need to be revisited once the scope of the convention had been settled, as it could

ultimately have application beyond the offer of goods or services. It was suggested that more neutral text such as a reference to the term "sender" might be preferable.

114. A proposal was made that the words "the person making the proposal", as was used in article 14, paragraph 2, of the United Nations Sales Convention, or similar words would be more appropriate. The Working Group agreed to that suggestion.

115. It was also suggested that the term "clearly" should be included in paragraph 1 of draft article 9 before the words "indicates the intention of the offeror to be bound in case of acceptance" to better align the text with the approach taken in article 14, paragraph 2, of the United Nations Sales Convention.

116. In respect of paragraph 2 of draft article 9, it was noted that the rule proposed in variant A was similar to the rule proposed in legal writings for the functioning of automatic vending machines (see A/CN.9/WG.IV/WP.95, para. 54). At the Working Group's thirty-ninth session, it had been 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). The Working Group was informed that variant A reflected that proposition and treated offers of goods or services, even where an "automated information system" was used, as an invitation to make offers.

117. However, it was noted that there was currently no standard business practice in that area and that the two variants represented the two different business practices that existed. It was said that, if the Working Group chose one variant, then that choice could do harm to the existing different practices with the result that parties could be misled into believing they were not bound when they were in fact bound or into believing that they were bound when in fact they were not bound.

118. It was further stated that the Working Group should not seek to fill a gap in business practice that either did not exist or on which there was no consensus. On that basis, it was suggested that the two practices, as reflected in variants A and B in paragraph 2 of draft article 9, could form part of an explanatory text instead of being included in the draft convention.

119. Having considered the various views, the Working Group was reminded that paragraphs 1 and 2 of draft article 9 could be combined in a single provision, 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, including offers using [automated information 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",

as had been suggested at the Working Group's thirty-ninth session (A/CN.9/509, para. 84).

120. Following discussions, the Working Group requested the Secretariat to prepare a text based on a combination of draft paragraphs 1 and 2 of draft article 9 as set out in the above paragraph to be included in the revised draft for further consideration by the Working Group. The revised draft should take account of earlier comments made in respect of draft article 9, paragraph 1.

Article 10. Other uses of data messages in international [transactions] [in connection with international contracts]

121. The text of the draft article was as follows:

> "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.]"

122. As a general comment, it was suggested that there might not be a need for the draft article as a separate provision and that draft articles 8 and 10 should be combined in a future version of the draft convention. It was pointed out that draft article 10 dealt with a wide range of communications that a party might wish to make in the context of an existing or contemplated contract. As offer and acceptance could also be regarded as falling under that category, there was no need to treat them separately in draft article 8.

123. In response, it was stated that it would be preferable to keep the two provisions separate, at least until a common understanding had emerged within the Working Group as to the scope of application of the convention and the content of current draft article 8. It was pointed out that, depending on the final decision on the scope of the convention, its rules might apply to a variety of communications that might not be regarded as being strictly made "in the context" of a contract. Also, merging the two provisions might have the consequence of extending to all communications currently covered by draft article 10 the principle of effectiveness upon receipt, which was embodied in draft article 8, paragraph 2. The Working Group, it was said, should consider carefully the implications of that result.

124. Having noted those views, the Working Group decided that the desirability of combining draft articles 8 and 10 should be considered at a later stage.

Paragraph 1

125. The question was raised as to whether the words "in connection with a contract" or "in the context of a contract" were broad enough to encompass all types

of communication intended to be covered by the draft paragraph. Pursuant to one view, no additional language was needed, as the current words, or their equivalent in draft article 1, were sufficiently flexible and could be read to include communications that took place between the parties even if no contract came into being. However, the countervailing view, which gathered considerable support, was that it might be useful to include an additional qualification that made it clear that the communications referred to in the draft article might occur before or after the formation of a contract, such as "before, during or following an existing or contemplated contract". The Working Group agreed that possible options to enhance clarity in the draft article should be explored in a revised version of the provision.

126. The Working Group agreed to delete the words "Unless otherwise agreed by the parties", as well as the closing phrase in square brackets, as had been done with similar phrases in connection with draft article 8, paragraph 1 (see paras. 97-100).

Paragraph 2

127. As it had done in connection with paragraph 3 of draft article 8 (see paras. 107 and 108), the Working Group agreed to retain the draft paragraph for further consideration, as it restated the general rule of non-discrimination of data messages, which was one of the fundamental principles of the UNCITRAL Model Law.

Paragraph 3

128. The Working Group noted that, given the broad scope of the draft convention, which in its revised version covered various types of electronic communication and not only contract formation, the draft paragraph offered two possibilities for providing additional specific exclusions to the provisions of draft article 10. The first alternative in square brackets would require the Working Group to develop a common list of exclusions, whereas the second alternative would leave the matter for declarations by a contracting State under draft article X.

129. Doubts were voiced as to the desirability of adding a specific provision on exclusions in the draft paragraph, as draft article 2 already contemplated such a possibility. The purpose of the draft convention was to remove obstacles to electronic commerce and, for that purpose, any exceptions to the regime of the draft convention should be kept to a minimum.

130. In response, it was pointed out that draft article 2 contemplated exclusions by subject matter, in which case any and all communications relating to an excluded contract would fall outside the scope of the draft convention. The draft paragraph, in turn, contemplated exclusions of specific types of communication, leaving other communications not expressly excluded to fall under the draft convention, even if they related to the same contract. The need for the draft paragraph was justified by provisions of domestic law that required certain types of notice related to contract formation or termination to be made in writing. An example of such requirements might be notices of termination of loan agreements, which, pursuant to rules on debtor protection of some jurisdictions, were not admissible in any form other than a notice written on paper. An international convention such as the one under consideration, it was said, should not interfere with the operation of those rules of domestic law.

131. The Working Group agreed that there might indeed be instances where reasons of public policy might require that certain types of communication be subject to more stringent form requirements than others, even if relating to the same contractual relationship. As regards the manner in which such exclusions might be made, there were expressions of support for developing a common list of exclusions, in the interest of ensuring a high degree of uniformity in the application of the convention, but there were also expressions of doubt as to the feasibility of developing such a list. The Working Group agreed to keep both options in the text and to revert to the matter later.

Article 11. Time and place of dispatch and receipt of data messages

132. The text of the draft article was as follows:

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.

"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.

"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."

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."

General comments

133. The discussion focused initially on the general structure of the draft article as reflected in the two variants. It was recalled that, except for draft paragraph 4, the rules contained in variant A were 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 followed more closely the style of the United Nations Sales Convention. By contrast, variant B was intended to reflect a line of thought expressed during the thirty-ninth session of the Working Group that it would be preferable to replace paragraphs 2-5 of variant A 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 (A/CN.9/509, para. 96).

134. Some support was expressed for variant B, which was said to present the advantage of simplicity and to avoid operating what was described as a complex legal distinction according to whether or not the addressee had designated an information system for the receipt of data messages. Another advantage of variant B was said to be that it avoided any interference with existing substantive rules of contract formation under applicable law. In addition, it was suggested that a provision along the lines of variant B should be preferred for the reason that it was in line with harmonized rules currently promoted by certain regional organizations. In response, it was pointed out that the search for simplicity, a characteristic that, in itself, could appeal to the business community, should not lead those drafting the convention to disregard the need to ensure a high level of predictability and certainty with respect to contract formation. It was strongly felt that, on such important issues as the time and place of contract formation, the need for certainty was paramount. In that respect, variant B was found to be gravely lacking in precision, open to misinterpretation and oblivious of the practical needs of users of electronic commerce techniques.

135. It was suggested that the Working Group should try to improve on variant B to reach an acceptable formulation of a simple and abstract rule, while providing the required level of certainty with respect to a variety of factual situations by way of a guide or other explanatory material. The prevailing view, however, was that provisions on the issues of time and place of receipt of data messages should be further refined on the basis of variant A, possibly with a view to adopting a simpler version of that variant. In support of variant A, it was further stated that a nuanced system distinguishing whether an information system had been designated by the addressee and used by the sender reflected electronic commerce practice more closely. It was also stated that variant A was more likely to meet the needs of those countries which did not already have elaborate rules on contract formation in the context of electronic commerce transactions. Various suggestions were made as to how variant A could be improved. One suggestion was that, for a data message to be deemed to be received, paragraph 2 should require that the addressee should be aware of the entry of the data message in the relevant information system and able to retrieve the message. Another suggestion was that the words "unless otherwise

agreed by the parties" should be deleted from paragraphs 1, 2 and 4 as superfluous. Yet another suggestion was that the order of paragraphs 3 and 4 should be reversed. A further suggestion was that paragraph 4 should be deleted, since requiring that a message should be "capable of being retrieved and processed" went beyond the notion of availability that seemed to inspire article 24 of the United Nations Sales Convention.

136. After consideration of the various views that had been expressed, the Working Group decided to retain variant A as the basis for continuation of the discussion and proceeded to consider its individual provisions and proposals for improving their clarity. As a result of the extensive discussions held by the Working Group in connection with draft paragraph 2 (see paras. 141-151), it did not have time to consider draft paragraphs 3-5 at its forty-first session.

Paragraph 1

137. As a general comment, it was pointed out that the notions of "dispatch" and "receipt" of data messages, which appeared throughout the draft article, were not used elsewhere in the draft convention, thus raising the question of the need for specific provisions dealing with those notions. Another related question was whether a definition of dispatch and receipt, which was said to be a question of substantive law, in particular as regards contract formation, should not be better left to domestic law or other international conventions dealing with contract law, so as to avoid a duality of regimes, depending on the means of communication used by the parties. In response, it was pointed out that one of the main objectives of the draft convention was to provide guidance that allowed for the application, in the context of electronic contracting, of concepts traditionally used in international conventions and domestic law, such as "dispatch" and "receipt" of communications. To the extent that those traditional concepts were essential for the application of rules on contract formation under domestic and uniform law, the provision of functionally equivalent concepts for an electronic environment was said to be an important objective of the draft convention. There was strong support for that objective and, in general, for the idea that draft paragraph 1 was a useful provision.

138. The Working Group agreed that, as had been done elsewhere in the draft convention, the opening words "Unless otherwise agreed by the parties" in paragraph 1 and in the remaining portions of the draft article should be deleted. In that connection, the question was asked as to whether the parties' intent to derogate from the provisions contemplated in the draft article could be inferred from the fact that they had agreed on a different set of rules for determining dispatch and receipt, or whether the agreement to derogate should make explicit reference to the provisions of article 11 from which the parties intended to deviate. In response, it was pointed out that draft article 4 allowed the parties to exclude the application of the convention as a whole or only to derogate from or vary the effect of any of its provisions. While an exclusion of the convention as a whole would normally require a specific reference to that effect, variations from its individual provisions could be effected without specific reference to the provisions being derogated from.

139. A proposal was made to the effect that, in order to simplify the structure of the draft article, paragraphs 1 and 4 could be combined into a single provision that stated that the dispatch of a data message occurred when it entered an information system outside the control of the originator or, in any case, when the data message

became capable of being retrieved and processed by the addressee. That proposal was objected to on the grounds that draft paragraphs 1 and 4 dealt with different situations, in that draft paragraph 1 contemplated parties using different information systems, while draft paragraph 4 applied to messages exchanged between parties using the same information system. In the case of draft paragraph 4, the objective criteria based on the moment when the data message entered an information system outside the control of the originator could not be used, a situation that required the use of another criterion. It would, however, be undesirable to extend the more subjective criterion provided in draft paragraph 4 to the situation contemplated in draft paragraph 1.

140. With a view to enhancing understanding of the provision, it was suggested that the order of the sentences could be reversed along the following lines:

> "1. When a 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, the data message is deemed to have been dispatched."

The Working Group took note of that drafting suggestion and agreed that it could be considered at a later stage.

Paragraph 2

141. The Working Group's deliberations focused initially on the third sentence of the draft paragraph, which dealt with the time of receipt of a data message sent to an addressee who had not designated a particular information system for the receipt of the data message.

142. It was pointed out that, in implementing the UNCITRAL Model Law on Electronic Commerce, which had a similar provision in its article 15, paragraph 2 (b), some jurisdictions had replaced the rule of receipt based on the time a data message "entered an information system of the addressee" with another rule whereby, in the absence of a designated information system, a message was deemed to be received when the addressee became aware of the data message and the data message was capable of being retrieved. It was suggested that the rule contained in the UNCITRAL Model Law, and reflected in the second sentence of the draft paragraph, should be reconsidered, as it might lead to the undesirable result of binding the addressee even in the event that the data message was sent to an information system rarely or at least not routinely used by the addressee in the regular course of its business dealings.

143. The Working Group heard expressions of strong support for that suggestion. It was acknowledged that requiring actual awareness of the addressee constituted a more subjective rule than the one contained in the draft paragraph. However, such a rule was said to be more equitable than holding the addressee bound by a message sent to an information system that the addressee could not reasonably expect would be used in the context of its dealings with the originator or for the purpose for which the data message had been sent.

144. However, there were also various objections to that suggestion. In favour of retaining the rule contained in the second sentence of the draft paragraph, it was stated that the proposed change would in practice mean that the addressee alone would have the power to cause the receipt of the message to occur, as the originator

would need to establish that the addressee had been made aware of the existence of the data message. That situation was said to be potentially unfair, for instance, to an originator who, in the absence of a designation of an information system by the originator, addressed the data message to the only information system of the addressee known to the originator. The fact that the addressee might not routinely use such information system, it was said, could not always and as a general rule be held against the originator. Furthermore, it was suggested that a judge or arbitrator called to decide upon a dispute on the time of receipt of a data message would most likely apply a test of reasonableness to the choice of an information system by the originator in the absence of a clear designation by the addressee.

145. The Working Group paused to consider those views. It was recognized that both lines of thought were concerned with establishing a fair allocation of risks and responsibilities between originator and addressee. In normal business dealings, it was said, parties could be expected to take the care of designating a particular information system for the receipt of messages of a certain nature, where they owned a number of information systems, and to refrain from disseminating, for example, electronic mail (e-mail) addresses they rarely used for business purposes. By the same token, however, parties should be expected not to address data messages containing information of a particular business nature (e.g. acceptance of a contract offer) to an information system they knew or ought to have known would not be used to process communications of such a nature (e.g. an e-mail address used to handle consumer complaints). It was said that it was not reasonable to expect that the addressee, in particular large business entities, should pay the same level of attention to all the information systems it had established.

146. Having noted the common elements and concerns between the two lines of argument that had been put forward, the Working Group considered further proposals for clarifying the objectives of the third sentence of draft paragraph 2. One such proposal was to reformulate that sentence to the effect that, if the addressee had not designated an information system, receipt should be deemed to have occurred when the data message entered an information system of the addressee, unless if 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. Another proposal was to provide that, in the absence of designation of an information system, receipt occurred when the data message entered an information system of the addressee, unless the addressee could not reasonably expect that the data message would be addressed to the particular information system to which the data message was sent.

147. It was generally agreed that those proposals deserved further consideration by the Working Group at a later stage, as alternatives to the current text of the third sentence of the draft paragraph, which the Secretariat was requested to prepare for continuation of the deliberations of the Working Group at a later stage. It was suggested that, in its future consideration of those issues, the Working Group should examine the implications of additional factual situations, such as the possible existence in some information systems of firewalls that automatically prevented the entrance of messages identified as being corrupted or that placed suspect messages on “quarantine” or automatically blocked messages coming from a specific sender. The Working Group took note of that suggestion.

148. The view was expressed that some of the difficulties that some delegations had encountered with the last sentence of draft paragraph 2 derived from the notion of "designated information system" and the uncertainty as to the level of precision that might be required in order for an indication of an information system to constitute a "designation" of an information system. Those difficulties, it was added, could not simply be overcome by a definition of what constituted a "designated information system", as they were inherent in the structure of the draft paragraph, which was criticized for being overly complex and for containing an excessive level of detail. It was noted that the different criteria for determining receipt of data messages, which was used in the first and the second sentences of the draft paragraph, might lead to conflicting results, depending on the understanding given to the word "information system". For example, if "information system" covered systems that carried data messages to their addressees, including, for instance, an external server, a data message might be deemed to have been received by the addressee under the first sentence of the draft paragraph even if it was lost prior to retrieval, as long as the loss had occurred after the message had entered the server's information system and that system was a "designated system". Under the second sentence of the draft paragraph, however, the lost message would not be deemed to have been received by the addressee on the grounds that it had not been actually retrieved by the addressee simply because the server's information system had not been "designated" by the addressee. It was said that there was no justification for those discrepancies, which were only due to the complexity of the draft paragraph. In order to avoid such discrepancies, it was proposed to insert a provision in paragraph 2 covering the situation where the addressee had designated, for instance, an e-mail address, in which case the data message should be deemed to have been received at the time when the retrieval of that data message by the addressee from an information system administered by an intermediary could normally be expected or at the time when a data message directly transmitted to the information system of the addressee entered that system.

149. The Working Group took note of that proposal but noted that the proposal had not received sufficient support. Instead, strong support was expressed for the view that the rules in the draft paragraph established useful distinctions that reflected the reality of solutions found by business entities that routinely used electronic communications. Rather than being unnecessarily complex, the draft paragraph distinguished between three basic situations to achieve a higher level of legal certainty, which subjective notions such as "accessibility" could not provide. It was pointed out that the entire draft paragraph was based on article 15 of the UNCITRAL Model Law on Electronic Commerce and that care should be taken to avoid inconsistencies between the two texts. As currently formulated, the rules contained in the draft paragraph were felt to replicate, in an electronic environment, the tests used for dispatch and receipt of paper-based communications, namely, the moment when the communication left the sphere of control of the sender and the moment when it entered the sphere of control of the recipient. The notion of "entry" into an information system, which was used for both the definition of dispatch and that of receipt of a data message, referred to the moment when a data message became available for processing within an information system. It was pointed out, moreover, that the notion of "information system" was intended to cover the entire range of technical means for generating, sending, receiving, storing or otherwise processing data messages and that, depending on the context, it could include a

communications network, an electronic mailbox or even a telecopier. However, care should be taken to avoid confusion between information systems and information service providers or telecommunications carriers that might offer intermediary services or technical support infrastructure for the exchange of data messages.

150. Furthermore, it was said that paragraph 2 contained an important rule allowing the parties to designate a specific information system for receiving certain communications, for instance, where an offer expressly specified the address to which acceptance should be sent. Such a possibility was said to be of great practical importance, in particular for large corporations using various communication systems at different places.

151. The Working Group considered at length the differing views that had been expressed. While a broadly held view was in favour of retaining the draft paragraph as its working basis, the Working Group agreed that the matter required further consideration, possibly in connection with a future review and discussion of the notion of "information system" in draft article 5, subparagraph (e).

Notes

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

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

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

[4] Ibid., para. 295.

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

[6] Ibid., para. 207.